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Essay

IDENTITIES AND ROLES: RACE, RECOGNITION, AND PROFESSIONAL RESPONSIBILITY

DAVID B. WILKINS*

> The triumph of what might be termed the standard version of the professional project would . . . be the creation, by virtue of professional education, of almost purely fungible [lawyers]. Such apparent aspects of the self as one's race,

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* Kirkland & Ellis Professor of Law and Director of the Program on the Legal Profession, Harvard Law School. A.B., J.D., Harvard University. This Essay is a revised version of the 1997 Stuart Rome Lecture, delivered at the University of Maryland School of Law on April 17, 1997. I would like to thank Howard Erlanger, Marc Galanter, Bob Gordon, Amy Gutmann, Deborah Rhode, Jane Schacter, participants at the Francis X. Riley Lecture on Professionalism at Northern Illinois University School of Law, Yale Law School's Lecture Series on Legal Ethics, Teachers College Philosophy of Education Colloquium, and the 1997 keynote address at the Society for Practical and Professional Ethics for helpful comments on earlier drafts. Daniel Steinman and Mary Ann Peterson provided invaluable research assistance.

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> gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer.[1]
>
> "[T]he primary social justification" for the black lawyer in the United States [is] "the social service he c[an] render the race as an interpreter and proponent of its rights and aspirations."[2]
>
> Perhaps what the claim of one's people implies is something rather different, something personal, a choice within a choice. . . .
>
> This means, of course, that every one of us who is black and a professional becomes insulated from the cruel suggestions that we have left our people behind, because only *we* know that.[3]

Professionalism can be a greedy ideology.[4] On most traditional accounts, becoming a "professional" involves more than simply performing a specific job or assuming a certain social standing. Instead it involves becoming a certain kind of person, a person who both sees the world and acts according to normative standards that are separate from (although not necessarily in opposition to) those that govern non-professionals. Through a complex process involving self-selection, professional education, collegial socialization, and the threat of professional discipline, individuals who enter into professions such as law or medicine are presumed to adopt a new professional identity based on the unique norms and practices of their profession. This "professional self,"[5] in turn, subsumes all other aspects of a professional's identity and, at a minimum, becomes the sole legitimate basis

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1. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578-79 (1993).

2. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 218 (1983) (quoting Charles Hamilton Houston).

3. Stephen L. Carter, *The Black Table, the Empty Seat, and the Tie*, *in* LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION 55, 78 (Gerald Early ed., 1993).

4. *See generally* LEWIS A. COSER, GREEDY INSTITUTIONS: PATTERNS OF UNDIVIDED COMMITMENT 5 (1974) (defining greedy institutions as those "which make total claims of their members . . . [and] seek exclusive and undivided loyalty and attempt to reduce the claims of competing roles and status positions on those they wish to encompass within their borders").

5. I borrow the term from Nelson and Trubek. *See* Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177, 183-84 (Robert L. Nelson et al. eds., 1992).

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for actions undertaken within the confines of her professional role.[6] Professor Sanford Levinson, in the first epigraph at the beginning of this Essay, aptly labels this traditional account "bleached out professionalism."[7]

Bleached out professionalism is central to the dominant model of American legal ethics.[8] The legal profession has long claimed the right to define and inculcate its own normative standards and to enforce those standards through professional discipline.[9] The resulting rules of professional conduct are explicitly cast in universalist terms that purport to apply to all lawyers in all contexts.[10] Issues relating to a lawyer's non-professional identity—i.e., her gender, race, religion, or even that "residue of particularistic socialization that we refer to as our 'conscience'"[11]—are either omitted altogether or, in the case of "conscience," treated as an additional motivation for lawyers to uphold the profession's bleached out norms.[12] When we shift our attention to the "myths, lore, and narratives"[13] that lawyers have traditionally told themselves and the public about the nature of the

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6. As Richard Wasserstrom trenchantly argues, the hegemonic claims of the professional self often extend beyond the confines of the role itself:

> [T]o become and to be a professional, such as a lawyer, is to incorporate within oneself ways of behaving and ways of thinking that shape the whole person. . . . In important respects, one's professional role becomes and is one's dominant role, so that for many persons at least they become their professional being.

Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 15 (1975). Although my primary focus in this Essay is on the effect of racial identity on a lawyer's professional role, the tendency of "professionalism" to dominate every aspect of a lawyer's life provides additional grounds for rejecting what I will describe as bleached out professionalism.

7. Levinson, *supra* note 1, at 1578.

8. *See id.* (calling "bleached out" professionalism the "standard version" of the professionalism project).

9. *See, e.g.*, ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90-101 (1980) (arguing that the legal profession adheres to a specialized morality); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 104-47 (1988) (same). Needless to say, professionals have not always been successful in all of these socialization practices. *See, e.g.*, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 802-03 (1992) (arguing that the bar has been increasingly unsuccessful in its attempt to control the practice of professional regulation).

10. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY prelim. stmt., para. 5 (1980).

11. Levinson, *supra* note 1, at 1578.

12. *See* David B. Wilkins, *Everyday Practice* Is *the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICES AND TROUBLE CASES 68, 72 (Austin Sarat et al. eds., 1998) (arguing that the bar's official rules disregard race, gender, social class, and other personal characteristics of practitioners); MODEL RULES OF PROFESSIONAL CONDUCT pmbl., para. 6 (1992) ("[A] lawyer is also guided by personal conscience and the approbation of professional peers.").

13. Geoffrey C. Hazard, Jr., *Personal Values and Professional Ethics*, 40 CLEV. ST. L. REV. 133, 134 (1992).

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lawyer's role, the claim that a lawyer's non-professional identity is (or at least ought to be) irrelevant to her professional role becomes even more salient.[14]

The American legal profession's attachment to bleached out professionalism is hardly surprising. Norms such as neutrality, objectivity, and predictability are central to American legal culture. As Stephen Pepper argues, lawyers are the gatekeepers through whom citizens gain access to these important legal goods.[15] If the law is to treat individuals equally, he asserts, then lawyers must not allow their non-professional commitments to interfere with their professional obligation to give their clients unfettered access to all that the law has to offer. A professional ideology that treats normative commitments emanating from a lawyer's non-professional identity as relevant to her professional conduct appears to threaten this important role.[16]

In addition to the benefits that bleached out professionalism offers to the consumers of legal services, it also appears to safeguard the interests of the women and men who become lawyers. The universalizing claims made on behalf of the professional self suggest that differences among lawyers that might matter outside the professional sphere are irrelevant when evaluating the professional practices of lawyers. This universalizing tendency is arguably particularly important for new entrants into the legal profession, who are frequently subject to discrimination on the basis of certain aspects of their non-professional identities. These traditional outsiders have a powerful stake in being viewed as lawyers *simpliciter*—freed by their professional status from the pervasive weight of negative identity-specific stereotypes. A professional ideology that explicitly recognizes the importance of a lawyer's non-professional identity runs the risk of reinforcing stereotypes about group membership in a manner that threatens the goal of ensuring equal opportunity within the profession.[17]

These two arguments, which I will refer to respectively as the "consumer protection critique" and the "opportunity critique," stand as a powerful check against any proposal to modify or replace

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14. I discuss this point at some length in David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 2014-16 (1993) [hereinafter Wilkins, *Two Paths*].

15. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 616-18.

16. *See* Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27, 41-42.

17. *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 32-33 (1991) (articulating the danger of making prominent blacks "representatives of their people").

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bleached out professionalism as a normative ideal for American lawyers. Nevertheless, in my prior work I have proposed an ethical stance for black (or African American)[18] lawyers that appears to require just such a move. Specifically, I have argued that black lawyers have moral obligations to the black community that these women and men are entitled to consider when deciding how to act in particular cases, and more generally, in determining what it means to live a morally acceptable life in the law.[19]

In this Essay, I will argue that black lawyers[20] can adopt this moral stance, which I call the "obligation thesis," without either undermin-

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18. Alex Johnson has aptly noted a debate—carried on mostly in footnotes—about the proper way to refer to those of us who once were considered "Negroes." *See* Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1005 n.1 (1997). Like Johnson, but unlike Thurgood Marshall for whom I had the honor of clerking, I prefer "black" because I am a part of the "black power" generation. I also find "African American" somewhat misleading as a marker of either racial or cultural identification. Nevertheless, in deference to those who find important meaning in the latter term, I use the two interchangeably.

19. I first developed this argument in Wilkins, *Two Paths*, *supra* note 14. *See also* David B. Wilkins, *Social Engineers or Corporate Tools?* Brown v. Board of Education *and the Conscience of the Black Corporate Bar*, *in* RACE, LAW, AND CULTURE: REFLECTIONS ON *Brown v. Board of Education* 137, 138-39 (Austin Sarat ed., 1997) [hereinafter Wilkins, *Social Engineers*] (defending the application to today's black corporate lawyers of Charles Hamilton Houston's conception of black lawyers as "social engineers" for justice against charges of essentialism, futility, and political correctness); David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 MICH. L. REV. 795, 796 (1997) [hereinafter Wilkins, *Straightjacketing Professionalism*] (arguing that the evaluation of Christopher Darden's and Johnnie Cochran's actions in the Simpson case must account for their professional as well as their race-based obligations); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1033 (1995) [hereinafter Wilkins, *Race, Ethics, and the First Amendment*] (discussing the appropriate role of race in evaluating a black lawyer's decision to represent the Ku Klux Klan).

20. For reasons that I explain more fully elsewhere, I limit my analysis to black lawyers because I believe that there are important differences between the experiences of blacks and other minorities. *See* David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 501 n.12 (1996) (describing differences such as invidious stereotypes, including intellectual inferiority, applied more pervasively to blacks than other minorities). These differences plausibly affect the relationship between identity and professional role. I recognize two caveats to this limitation. First, because every black lawyer also has a gender, a sexual orientation, a social class, and (frequently) a religious affiliation, it is impossible to separate her "racial" identity from these other group-based affiliations. I return to this complexity in Part II. *See infra* notes 243-247 and accompanying text. Second, although I make no claim about whether the specific conclusions that I advance for black lawyers apply to lawyers who have important moral connections to other identity groups, it is central to my analytic structure that the *principles* I endorse are of general applicability. *See* Wilkins, *Two Paths*, *supra* note 14, at 1995 (arguing that the race-based obligations of black lawyers must be grounded in general moral obligations applicable to all citizens). For a thoughtful attempt to apply these concepts to gays and lesbians, see generally William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 HASTINGS L.J. 1101 (1997).

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ing the legitimate rights of consumers (including individual clients and the public as a whole) or unduly constraining their own professional opportunities. I do so by defining a role for the obligation thesis that expressly acknowledges the moral weight of legitimately enacted professional norms. This role neither turns black lawyers into racial patriots whose sole responsibility, in the words of Charles Hamilton Houston quoted in the second epigraph to this Essay, is to be an "interpreter and proponent of [black] rights and aspirations," nor treats racial obligations as "personal" commitments as advocated by Stephen Carter in the third epigraph. Instead, I will argue that black lawyers must negotiate three "semi-autonomous" and, ultimately, "secondary" moral realms: the "professional," representing the legitimate moral demands emanating from the norms and practices of the legal profession; the "obligation thesis," representing the legitimate moral claims emanating from a black lawyer's membership in the black community; and the "personal," representing the unique desires and commitments that black lawyers have in virtue of their basic humanity. By "semi-autonomous" I mean that each moral universe incorporates aspects of the other two within its own domain without collapsing into one realm or the other. Each of these moral spheres is "secondary" in the sense that the legitimate demands of each are bounded by common morality.

Black attorneys, I submit, must learn to recognize and analyze the legitimate moral claims of each of these three domains. Three principles should guide this complex task. First, whenever possible, black lawyers should seek to narrow the range of conflict among these competing moral claims by construing the obligations generated by each domain in their best possible light and in accordance with the conventions and practice that give each moral domain its coherence and status *as* a moral domain (as opposed to a conduit for simple self-interest). Second, in the event that a conflict between the legitimate demands of the three spheres cannot be avoided—and I believe that such conflicts are inevitable—black lawyers should choose the course of action that best supports the "social purposes" underlying the lawyering role in question. By social purpose, I mean those tasks that disinterested actors seeking to fulfill the legitimate social function the lawyer has been charged with carrying out would agree were necessary to the performance of that particular role. As I will make clear, this criterion builds from, but ultimately transcends, the existing professional rules of conduct. Finally, in those circumstances where honoring the social purpose of a particular lawyering role requires a given black lawyer to ignore or slight a legitimate moral interest emanating

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from one of the three moral domains—which once again, I believe to be inevitable—she must honor this "moral remainder" in some other part of her professional life. A moral life in the law, therefore, involves learning how to balance the competing demands of these domains in a manner that ensures that, over time, each realm is given its legitimate due.

The remainder of this Essay attempts to flesh out these abstract principles. Part I begins by setting out three well-known cases that raise important issues about the competing demands of professionalism, racial solidarity, and personal integrity. Subparts A, B, and C use these cases to illustrate the three dominant approaches for analyzing the intersection of race and professional role: "bleached out professionalism," "representing race theory," and "personal morality lawyering." Subparts D and E criticize these models, first for failing adequately to account for the role that race plays in constructing the identities of black Americans, and second for failing to pay sufficient attention to important contextual differences in the lawyer's role.

Part II incorporates this understanding of "identity" and "role" for black attorneys into a general model for negotiating the complex intersection of professionalism, race, and personal autonomy. My aim here is to delineate the parameters of the three moral domains described above—the "professional," the "obligation thesis," and the "personal"—and to propose a framework for understanding their relationship to each other and to the general demands of common morality. Part III then applies this general framework to the cases described in Part I. By examining how a black lawyer might decide how to balance the conflicting demands of professionalism, race, and autonomy in specific circumstances, I hope to demonstrate how the analytic scheme I propose minimizes, although it certainly does not negate, the force of both the consumer protection and opportunity critiques. Finally, Part IV concludes this Essay by setting out some of the challenges of living in a "post-bleached out" professional world.

Before proceeding, however, it is important to underscore the limited nature of my argument. I do not intend to repeat my defense of what many critics find most controversial about the obligation thesis—that is, of course, the proposition that racial identity is relevant to moral obligation. Instead, my goal in this Essay is to defend a narrower claim, to wit, that the obligation thesis is not inconsistent per se with the legitimate demands of professionalism or personal autonomy. I am therefore only concerned with what I have elsewhere referred to as the weak version of the obligation thesis, i.e., the claim

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that it is morally permissible for black lawyers who believe in the obligation thesis to act on the basis of this belief.[21]

Making progress on this narrower claim is important, I submit, for two reasons. First, many—indeed, I would wager, although I certainly cannot prove, most—black Americans subscribe to some version of the obligation thesis. Blacks who endorse the obligation thesis have a strong interest in developing a coherent scheme for discovering the content of race-based obligations and the manner in which these obligations should be balanced against other commitments. Second, those blacks who do not endorse the obligation thesis may reject race-based commitments on grounds similar to those expressed in the consumer protection and opportunity critiques. To the extent that there is a way of endorsing racial obligations that minimizes these twin dangers, some blacks who currently eschew race-based obligations may be persuaded to change their minds. In the same vein, whites and others who currently view race-based obligations for black lawyers as inevitably corrosive on grounds that sound in either the consumer protection or opportunity critiques may also be persuaded to abandon, or at least to reduce, their opposition. It is to these groups that my arguments here are principally addressed.

I. BLEACHED OUT PROFESSIONALISM AND ITS DISCONTENTS

Consider the following cases:

> 1. Anthony Griffin, a black lawyer affiliated with the ACLU, agrees to defend the Grand Dragon of the Ku Klux Klan. The case involves the State of Texas's attempt to subpoena the Klan's membership list in order to assist a probe into Klan violence against black residents in a newly integrated housing project. The African American head of the Port Arthur branch of the NAACP subsequently fires Griffin from his position as the unpaid general counsel for that organization when Griffin refuses to withdraw from representing the Klan.[22]
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> 2. Robert Johnson, the elected black district attorney representing the Bronx, announces that he will refuse to seek the state's newly enacted death penalty in any case in part because he believes it will inevitably be applied in a ra-

21. Wilkins, *Two Paths*, *supra* note 14, at 1985. The strong version asserts that blacks are morally required to accept the obligation thesis.

22. *See* Sam Howe Verhovek, *A Klansman's Black Lawyer, and a Principle*, N.Y. TIMES, Sept. 10, 1993, at B9, *available in* LEXIS, News Library, Nyt File; *see also* Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 19, at 1030.

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cially discriminatory manner. Subsequently, Governor Pataki removes Johnson from considering whether to seek the death penalty in a highly publicized case involving three young black youths accused of shooting a white police officer. Pataki replaces the black DA with a white lawyer who is a committed death penalty hawk.[23]

3. Gil Garcetti assigns Christopher Darden as one of the lead prosecutors in the racially charged Simpson prosecution. During the course of the trial, Darden seeks to bar the defense from questioning Mark Fuhrman about whether he used racial epitaphs in the past. Subsequently, Johnnie Cochran, the black lead defense lawyer, argues to the predominately black jury that they should acquit his client in part as a means of "sending a message" that police racism and misconduct will not be tolerated.[24]

Each of these high-profile cases has become a part of America's great conversation—or more accurately "angry polemic"[25]—on race. At one time or another, each of the major black protagonists—Griffin, the head of the Port Arthur branch of the NAACP, Johnson, Darden, and Cochran—has been accused of racial "crimes" ranging from "selling out" to "playing the race card."[26] Other equally vociferous combatants retort that one or the other of these attorneys has in fact served the cause of racial justice by upholding the highest standards of professionalism.[27] These high profile cases, therefore, provide useful vehicles for examining the relationship between racial identity and professional role.

In this Part, I argue that the debate over these and other similar racially charged cases has been dominated by bleached out professionalism, representing race theory, and personal morality models of professionalism. Subparts A, B, and C briefly describe in turn the salient features of, and the justifications for, bleached out professional-

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23. *See* John M. Goshko, *Police Killing Sparks Debate on Death Penalty in New York*, WASH. POST, Mar. 24, 1996, at A24, *available in* LEXIS, News Library, Wpost File.

24. *See* Margaret M. Russell, *Beyond 'Sellouts' and 'Race Cards': Black Attorneys and the Straightjacket of Legal Practice*, 95 MICH. L. REV. 766, 773 (1997); Wilkins, *Straightjacketing Professionalism*, *supra* note 19, at 795-96.

25. K. Anthony Appiah, *Epilogue* to COLOR CONSCIOUS, THE POLITICAL MORALITY OF RACE 179 (K. Anthony Appiah & Amy Gutmann eds., 1996).

26. For commentators on these accusations, see Russell, *supra* note 24, at 779 & n.35, 788-89 & nn.59-60.

27. *See, e.g.*, Andrea Ford, *Black Leaders to Honor Darden as Role Model*, L.A. TIMES, Dec. 13, 1995, at B1 (referring to both Darden and Cochran as role models); Henry Weinstein, *Delicate Case Ends on Up Note for Darden*, L.A. TIMES, Sept. 28, 1995, at A1 (quoting Reginald Holmes, former president of the largest black lawyers' organization in Southern California: "'[T]he buttons on my shirt were popping with pride—[Darden] did a magnificent job.'").

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ism, representing race theory, and personal morality lawyering. Subparts D and E then critique these proffered justifications on two related grounds. In subpart D, I argue that both bleached out and representing race models misunderstand the salience of race in constructing the moral identity of at least some African American lawyers. Subpart E argues that both models also pay insufficient attention to contextual differences among differing lawyering roles that plausibly affect the weight that particular black attorneys ought to be able to give to race-related factors when deciding how to act in specific cases.

A. Bleached Out Professionalism: What's Race Got to Do with It?

Bleached out professionalism is the dominant narrative through which most observers have examined the conduct of the attorneys in the three cases cited at the beginning of this Part. The following editorials are typical of the public's reaction to the possibility that racial considerations might have influenced the conduct of the two prominent black attorneys in the Simpson case. In addressing the so-called Darden Dilemma involving the difficulties that black prosecutors such as Darden face in prosecuting black defendants, Ken Hamblin writes that society has a legitimate right to demand that those who become prosecutors should "leave their bias behind to serve as the people's counsel."[28] Hamblin concludes that any minorities who believe that they have a "special allegiance to people of color" should "[s]top polluting the legal profession."[29] William Safire's charge that "Simpson's black attorney . . . blatantly urg[ed] [the predominately black jury] to ignore the evidence of murder and to get even for society's past injustices"[30] reflects a similar assumption that Cochran improperly allowed racial considerations to pollute his legitimate obligations as defense counsel.

Indeed, most participants in these cases, including virtually all of the black lawyers, have been careful to pay allegiance to bleached out professionalism as a core professional ideal. Thus, Anthony Griffin sometimes claimed that race had "nothing to do" with his decision to represent the Klan,[31] branding as "racist" both "'those black folks who told me I should have let a white lawyer take th[e] case'" and "'An-

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28. Ken Hamblin, *No Excuse for Color-Coded Justice*, ATLANTA J. & CONST., Apr. 10, 1996, at A15, *available in* 1996 WL 8200403.

29. *Id.*

30. William Safire, *After the Aftermath: Damage Done*, ATLANTA J. & CONST., Oct. 13, 1995, at A19, *available in* 1995 WL 6556856.

31. Kevin Moran, *Black Lawyer Giving His Best to the Klan; Galveston Man Calls His ACLU Work a Way to Safeguard First Amendment*, HOUS. CHRON., July 27, 1993, at 1A, *available in* LEXIS, News Library, Hchron File.

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glos, who regarded me as some kind of oddity because I was a black man who represented the Klan.'"[32] Similarly, Christopher Darden flatly states that "'if I thought I was being assigned to the case primarily because I was black, I would've rejected it.'"[33] Nevertheless, Darden believes that for many Americans, he "'was a black prosecutor, nothing more.'"[34]

The vehemence with which the above quoted participants and observers deny that race either was, or if it was, should have been, a consideration in the minds of any of the attorneys in these celebrated cases underscores the degree to which many Americans equate bleached out professionalism with basic norms of fairness and opportunity. The consumer protection and opportunity critiques capture this connection. As I indicated at the outset, both lawyers and society as a whole have an important stake in knowing that "the quality of lawyering and of justice an individual receives does not depend on the group identity of the lawyer or judge."[35] From the client's perspective, this understanding of the lawyer's role appears to offer vulnerable consumers the benefits of standardization. Clients need not ask whether a given lawyer does or does not subscribe to a particular professional norm. Nor is it important for the client to investigate the lawyer's background or personal beliefs, because these contingent features are, by definition, irrelevant to how the lawyer will perform her professional role. Given that many Americans find racial issues especially difficult and divisive, bleached out professionalism's promise to render racial questions irrelevant is likely to appear particularly welcome to clients who believe that focusing attention on race interferes with the development of supportive and effective professional relationships.

The societal benefits promised by bleached out professionalism are equally, if not more, significant. The legal profession plays an essential role in our legal and political order. That role requires that in addition to being partisan advocates, lawyers are also "officers of the court" with obligations to support the fair and efficient administration

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32. Nat Hentoff, *A Free Speech Lawyer Fired by the NAACP*, WASH. POST, June 25, 1994, at A21 (quoting Griffin).

33. Ellis Cose, *Introduction* to THE DARDEN DILEMMA vii, vii (Ellis Cose ed., 1997) (quoting Darden).

34. *Id.* (quoting Darden).

35. Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613, 1629 (1993). Professor Pearce nevertheless goes on to critique the notion of the "bleached out" professional. *See id.*

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of justice.[36] To be sure, lawyers have often failed to live up to this role.[37] Nevertheless, bleached out professionalism promises that every lawyer will at least be committed to the norms and practices underlying this crucial aspect of professionalism. Removing that promise would arguably make it even more difficult for society to hold lawyers accountable for protecting legal rules and structures, because divergent groups of lawyers might hold quite different understandings of how they should relate to clients and state officials. To take only one example, a regime that allows lawyers to opt out of otherwise applicable professional norms on the basis of sincerely held extra-professional beliefs or commitments would arguably require enforcement officials to determine the sincerity of an individual's moral convictions before deciding whether to grant the exemption. This exercise would likely place considerable strain on an already weak system for enforcing professional norms.[38]

Finally, abandoning the universalist claims of the traditional model threatens to undermine the legal profession's role as an important avenue for social advancement. The profession's long history of exclusionary practices is well documented.[39] Notwithstanding this unfortunate history, however, law has been an important entree to social status and economic security for many Americans. Beginning with Irish and Italian immigrants in the 1930s, and continuing with Jews, women, African Americans, Latinos, and most recently, Asian Americans, law has been one of the most accessible routes to professional status and a middle class lifestyle for those who stand at the bottom of the social pecking order.[40] Not surprisingly, these new entrants into the profession hope that their legal careers will come with all of the perquisites and privileges that those who currently occupy these positions enjoy.

For black lawyers, this is more than simply a quest for professional privilege. The presumption of competence and integrity that has traditionally accompanied the legal profession offers blacks the

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36. *See generally* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989).

37. Gaetke himself makes this point. *See generally id.*

38. *See* Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1261 (1998) ("Self-discipline has been difficult enough for the profession without adding to the Bar's task the determination of which believers are not bound by the profession's rules.").

39. *See* RICHARD L. ABEL, AMERICAN LAWYERS 123-26 (1989); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 102-29 (1976).

40. *See, e.g.*, ABEL, *supra* note 39, at 85-87 (examining the growth of immigrants and minorities in the legal profession); AUERBACH, *supra* note 39, at 95-96 (indicating significant changes to the composition of the profession as a result of mass immigration).

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promise of at least some protection from the otherwise pervasive myths of intellectual and moral inferiority with which African Americans must repeatedly cope. As a result, black lawyers and other traditional outsiders have a stake in being viewed as lawyers *simpliciter*, freed by their professional status from the pervasive weight of racial stereotypes.

To be identified as a *black* lawyer constitutes a potential threat to this important social goal. "Black" lawyers will inevitably be seen as being less than "real" lawyers, whose racial or ethnic background is presumed to be irrelevant to the performance of their professional role. As a consequence, clients—both black and white—may hesitate before engaging the services of these "different" lawyers. At the same time, there is a substantial risk that colleagues and others will treat these "raced" lawyers at best patronizingly, and at worst, as second class citizens. Given these dangers, the colorblind notion of bleached out lawyering stands as a check against the color consciousness (or more accurately, white racism) of the world in which we live.

In principle, these benefits of bleached out professionalism—the fact that all lawyers are ethically committed to providing a uniform professional product, and the claim that black lawyers are theoretically protected from negative implications flowing from their non-professional identities—are important regardless of the *content* of professional norms or whether the ideal of bleached out professionalism is *in fact* widely followed in practice. Thus, one can imagine bleached out understandings of lawyer professionalism that would acknowledge that race plays a central role in the administration of justice and require all lawyers to respond to the manner in which racial hierarchies predictably advantage and disadvantage particular citizens.[41] Similarly, one might argue that black lawyers should view themselves as bleached out professionals even though they are aware that others (lawyers, judges, clients) refuse to do so.

In practice, however, bleached out professionalism has been closely linked to particular normative and empirical claims that are themselves importantly bleached. Specifically, the idea that lawyers should not consider their racial identities when acting in their professional role is closely linked to the understanding that the legal rules and procedures that lawyers interpret and implement are also unaffected by issues of race. The claim that "our constitution"—and in-

41. *See* Frank I. Michelman, *Foreward: Racialism and Reason*, 95 MICH. L. REV. 723, 735 (1997) (arguing that it is possible to make a principled argument in favor of "racialism" as a legal ideal).

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deed justice itself—"is color-blind" is taken by many to be a bedrock principle of our legal order.[42] Lawyers who either explicitly or implicitly call attention to racial issues are frequently viewed as undermining this ideal.

This charge—that a lawyer who interjects race or racism into a legal proceeding has "played the race card" in a manner that undermines "colorblind" justice—is itself formally colorblind, but in practice, color-conscious. The charge is formally colorblind in the sense that it can be leveled against any lawyer regardless of that lawyer's race. Consider, for example, Brent Staples's claim that Gil Garcetti "played the race card" when he decided to prosecute Simpson in Los Angeles County, where there would likely be many blacks on the jury, rather than in virtually all-white Santa Monica County.[43] When a black lawyer adopts an explicitly race-conscious strategy, however, the charge of "playing the race card" is likely to be closely linked to the related charge of group-based loyalty in violation of the norms of bleached out professionalism. Once again, the Simpson case is instructive. When critics accused Johnnie Cochran of "playing the race card," they frequently linked Cochran's explicitly race-conscious lawyering strategy with his identity as an African American. Bill Maxwell's blistering attack on Cochran's closing argument succinctly captures how closely colorblindness is linked to bleached out professionalism when black lawyers employ race-conscious lawyering strategies: "The truth is that, along with using race as a blunt instrument against whites, blacks use it to craft relations with one another. . . . [T]he defense, led by the brilliant Johnnie Cochran, [played] the *intrarace* card . . . ."[44] Cochran, in other words, persuaded black jurors to ignore the standards of colorblind justice by employing arguments that were expressly designed to draw a link between his identity and theirs, a simultaneous violation of both colorblindness and bleached out professionalism.

Finally, the practical link between bleached out professionalism and colorblindness has been strengthened by the implicit empirical claim that the American legal system is *in fact* largely, if not completely, colorblind. Once again, there is no necessary connection be-

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42. The quoted phrase, of course, was first made famous by Justice Harlan in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

43. *See* Brent Staples, *Millions for Defense*, N.Y. TIMES, Apr. 28, 1996, § 7 (Book Review), at 15, *available in* LEXIS, News Library, Nyt File.

44. Bill Maxwell, *Courtroom Incivility; Another Kind of Race Card*, ST. PETERSBURG TIMES, Oct. 8, 1995, at 1D, *available in* LEXIS, News Library, Arcnws File.

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tween the normative and the empirical sides of the colorblindness debate. One can subscribe to colorblindness as a normative ideal without also believing that our legal institutions fully, or even largely, live up to this ideal in practice. Too often, however, proponents of the ideal of colorblindness conflate these two propositions. Jeffrey Rosen's recent diatribe against critical race theory is a case in point.[45] Rosen attacks critical race theorists for undermining colorblindness by, inter alia, "[a]scribing the sympathetic attributes of victimhood to a defendant because of his race."[46] Rosen argues that this ascription cannot be justified, as many critical race theorists suggest, on the basis of widespread racism either in society at large, or more specifically, within our legal institutions because, he blandly asserts, such racism simply does not exist.[47] As Frank Michelman points out, Rosen "offers not the slightest rebuttal to the premise [that non-whites suffer from endemic and institutional racism], beyond a ringing and risible declaration that the life of Judge Leon Higginbotham 'refutes' it."[48] Instead, as Michelman wryly notes, Rosen simply "chang[es] the subject" by attacking critical race theorists on the ground that "[t]he premise of institutional racism carries normative and prescriptive implications at odds with liberal ideals of colorblindness and individual responsibility, and *for that reason* cannot be entertained in legal argument."[49] This line of argument turns colorblindness from a claim about what our legal ideals ought to be into a powerful factual claim about how our legal and social institutions actually work in practice.

This conflation of the ideal and the reality of colorblindness, so pervasive in our popular and legal discourse, further strengthens the view that lawyers must "bleach" their minds and their actions of any reference to race. Rosen himself draws this link. Thus, the example Rosen uses to underscore the degree to which critical race theorists have undermined colorblind justice is Johnnie Cochran, who, according to Rosen, "dramatically enacted each of the most controversial postulates of the movement before a transfixed and racially divided nation."[50] As Margaret Russell cogently argues, by linking Cochran's undeniably race-conscious defense of Simpson to critical race theory, as opposed to the colorblind norm of zealous advocacy, Rosen implicitly draws a link between Cochran's use of race and what Rosen has

45. Rosen, *supra* note 16, at 27.
46. *Id.* at 42.
47. *Id.* at 39-42.
48. Michelman, *supra* note 41, at 728.
49. *Id.* at 729.
50. Rosen, *supra* note 16, at 27.

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previously asserted is the *false* claim that race continues to play an important role in America's social and legal institutions.[51] This final link in the connection between bleached out professionalism and colorblindness places black lawyers who have either experienced or witnessed the gap between the ideal and the actual of colorblindness in American law in a particular bind: "[they] must deny the realities of racism in order to appear balanced and fair in advancing the case of the client."[52] The practical effect of bleached out professionalism, therefore, is to push all lawyers[53] in the direction of accepting colorblindness as both a normative ideal and a factual reality in our contemporary culture.

Once again, there is nothing inevitable about this connection. For example, in his strong endorsement of a bleached out role for black faculty at predominately white institutions, Randall Kennedy expressly rejects colorblindness as inappropriately blinding faculty members to the manner in which race can and does affect the opportunities available to students.[54] Nevertheless, in contemporary legal culture, bleached out professionalism is powerfully linked with both normative and factual claims about colorblindness. It is this strong form of bleached out professionalism that I will be primarily concerned with here. It is also the understanding of professional identity—and indeed of law—that has spawned the development of representing race models of professionalism.

B. Representing Race: Race Has Everything to Do with It

Just as bleached out professionalism provides the dominant narrative through which most Americans have come to understand the three cases described at the beginning of this Part, representing race theories have supplied the counternarrative that has helped to give these events much of their saliency. Thus, the country's fascination with Darden and Griffin is fueled in part by the charge, sometimes explicit, often merely implicit, that these two black attorneys have "betrayed" their race—in Darden's case by working on behalf of a "hostile white society to bring a strong black man down,"[55] and in Griffin's, by representing an organization that has brutalized and intimidated Afri-

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51. Russell, *supra* note 24, at 791 n.67.

52. *Id.* at 788.

53. William Kunstler's career should remind us that white lawyers are also sometimes accused of playing the race card when they seek to expose the degree to which race continues to infect our legal and political institutions.

54. *See* Randall Kennedy, *My Race Problem and Ours*, ATLANTIC MONTHLY, May 1997, at 55, 65. I return to Kennedy's provocative thesis below.

55. Cose, *supra* note 33, at ix.

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can Americans for more than a century.[56] The general perception of Cochran and Johnson has been similarly influenced by the counternarrative of representing race theories, albeit in the opposite direction. With respect to these lawyers, the charge is that they have represented their racial interests all too well—Cochran by "playing the race card" to free Simpson and Johnson by opposing the death penalty on the basis of his loyalty to his predominately black and Latino constituents—all at the expense of their professional obligations.

The modern appearance (or, as I will argue shortly, reappearance) of this counternarrative—a narrative that places racial obligations at the center of a black lawyer's professional life—can be traced to developments in the legal academy. One of the most significant changes in the American legal profession during the last quarter century has been the dramatic increase in the diversity of those who study, practice, and teach law. The representing race critique of bleached out professionalism is in part the product of this diversity.

Women were the first to challenge the standard orthodoxy that professional norms either are or should be bleached. The history and significance of women's introduction into the legal academy is well documented and need not be repeated here.[57] Suffice it to say that in the 1960s, women began to challenge virtually every facet of traditional legal discourse.[58] It was not long before this critical gaze was turned toward the legal profession. Starting with Carol Gilligan's influential hypothesis about gender differences in the moral reasoning styles of men and women,[59] feminist scholars have argued that the rigid, detached, hierarchical, and adversarial character of traditional notions of lawyer professionalism reflect a distinctly "male" identity.[60] Some feminist scholars have gone further than this implicit rejection

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56. *See All Things Considered: African-American ACLU Attorney Represents Klan in Texas* (NPR radio broadcast, Sept. 19, 1993), *available in* LEXIS, News Library, Npr File (noting that many blacks have called Griffin a "Judas" for representing the Klan).

57. *See, e.g.*, DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 9-38 (1989).

58. *See id.* at 53-77 (discussing feminist challenges and legal responses in the 1960s and 1970s).

59. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1-2 (1982).

60. *See, e.g.*, RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 132-55 (1991) (discussing the entry of women into the male-dominated "game" of the practice of law); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 45-55 (1985) (focusing on the possible changes to the adversarial system as a result of the growing female voice in the legal profession).

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of one of the primary premises of bleached out professionalism.[61] These scholars suggest that women lawyers are likely to adopt different normative and structural approaches to legal practice than their male peers.[62] Needless to say, such gender-specific accounts remain controversial, even among feminists.[63]

Feminist scholars, however, have not been the only new entrants to the legal academy with questions about the perceived wisdom of traditional legal discourse. Beginning in the 1980s, a growing chorus of minority scholars have begun to challenge "the ways in which legal discourse inscribes and reproduces subordinating images of racial groups, and the ways in which legal institutions and discourse contribute to the construction and maintenance of racial hierarchies."[64] Not surprisingly, many critical race theorists have also turned their attention to the legal profession, particularly after a number of celebrated trials focused attention on the intersection of race and lawyering.[65]

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61. As I argue extensively elsewhere, the normative power of bleached out professionalism depends in part on the claim that the current norms of legal practice are independent of any particular identity. David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of "Bleached Out" Lawyering*, INT'L J. LEGAL PROF. (forthcoming 1998) (manuscript at 4, on file with author) [hereinafter Wilkins, *Fragmenting Professionalism*].

62. Carrie Menkel-Meadow summarizes these disparate theories as follows:

> [T]hose who claim women will change the legal profession because of their gender, argue that women may be more likely to adopt less confrontational, more mediational approaches to dispute resolution. . . . that women will be more sensitive to client's needs and interests, as well as to the needs and interests of those who are in relation to each other, for example, clients' families, or employees. They suggest that women employ different moral and ethical sensibilities in the practice of law, that women will use less hierarchical managerial styles, that women are more likely to have social justice or altruistic motives in practicing law. They believe that women will be more likely to develop greater integration between their work and family lives, seeking what the literature refers to as "horizontal," as well as "vertical" satisfaction.

Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 86-87 (1994) (footnotes omitted).

63. *See id.* at 87-89.

64. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 868 (1997). For a general description and compilation of significant writings by critical race theorists, see generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

65. Many of these articles are incorporated in a recent Symposium issue. *See* Symposium, *Representing Race*, 95 MICH. L. REV. 723 (1997); *see also* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1302-06 (1995) [hereinafter Alfieri, *Defending Racial Violence*] (discussing the Reginald Denny trial); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) [hereinafter Alfieri, *Lynching Ethics*] (discussing several celebrated lynching cases); Russell, *supra* note 24, at 795 (discussing the O.J. Simpson trial).

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These theorists challenge the central tenets of bleached out professionalism. Thus, instead of accepting colorblindness as both a factual premise and as an unquestioned normative ideal, critical race theorists argue that the experiences of minority lawyers and litigants can only be understood through the lens of the "master narrative" of race, which structures and defines the manner in which racial minorities are treated by the legal system.[66] Recognizing the power of this narrative, these theorists conclude, requires lawyers to cast off the bleaching pretensions of mainstream legal discourse and confront directly the extent to which race and racism are thoroughly enmeshed in legal discourse.[67]

The representing race model of lawyering, like the bleached out professionalism it challenges, underscores important goals that are central to our system of justice. As David Luban notes, "equal justice under law" is a core legitimating norm of our constitutional democracy.[68] For black Americans, however, race continues to pose a substantial obstacle to obtaining anything like equal access to the benefits and protections of the law.[69] Representing race accounts of lawyering, by focusing attention on this disparity and by directing lawyers to identify and to work against race prejudice, arguably help America move closer to its legitimating ideals. Moreover, as Amy Gutmann has recently stressed, fairness, not colorblindness, is a basic principle of justice.[70] Given that race continues to structure the life chances of black citizens, treating blacks fairly, Gutmann concludes, will often require expressly color-conscious public policy.[71] In the United States, lawyers are key actors in virtually every public policy arena. As a re-

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66. *See, e.g.*, Charles R. Lawrence III, *The Message of the Verdict: A Three-Act Morality Play Starring Clarence Thomas, Willie Smith, and Mike Tyson*, *in* RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 105, 107-17 (Anita Faye Hill & Emma Coleman Jordan eds., 1995) (using the "master narrative" to decode these three celebrated events); Russell, *supra* note 24, at 773-74 (arguing that the "master narrative" helps to explain why the public focused on intraracial conflict in the Simpson case rather than on the broad social issues presented by the case).

67. *See, e.g.*, Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 965-69 (1997) (arguing that lawyers should make race a part of their legal strategy even in cases where such issues are not expressly presented); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 959-64 (1997) (arguing that advocates for black women accused of harming their babies by ingesting crack during pregnancy should expressly make race a part of their legal strategy).

68. LUBAN, *supra* note 9, at 252-56.

69. *See generally* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992).

70. Amy Gutmann, *Responding to Racial Injustice*, *in* COLOR CONSCIOUS, *supra* note 25, at 109.

71. *Id.*

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sult, by counseling lawyers to pay careful attention to the manner in which their professional actions are likely to affect the fate of those groups who have been, and continue to be, disadvantaged by America's legacy of racial oppression, representing race theories further core moral, as well as legal, goals.

It is this feature of the representing race model—its connection to the social justice claims of the entire black community—that provides the strongest justification for transforming a general critique of colorblindness into a repudiation of bleached out professionalism. The claim that blacks who obtain positions of power and influence in American society have an obligation to "give back" to their community is an old and venerable one. W.E.B. DuBois, for example, argued that the primary goal of education for blacks was to develop "the Best of this race that they may guide the Mass away from the contamination and death of the Worst, in their own and other races."[72] The application of this maxim of race-based obligations to lawyers can be traced to Charles Hamilton Houston. In the 1930s, Houston argued that black lawyers should be trained to be social engineers "'prepared to anticipate, guide and interpret group advancement.'"[73] Over the next twenty years, Houston and his protégé Thurgood Marshall created a new model for achieving social justice through law and the nation's first public interest law firm, the NAACP Legal Defense and Education Fund, with the skill and commitment to put that strategy into action. By calling on black lawyers to pay particular attention to the manner in which their professional activities are likely to affect the interests of the black community as a whole, representing race accounts of lawyering continue this Houstonian tradition.

The benefits of Houston's social engineering model for the justice claims of black Americans in the period leading up to *Brown v. Board of Education*[74] cannot seriously be challenged.[75] Perhaps it is possible to imagine that *Brown* would have eventually occurred without Houston's black social engineers, but it hardly seems worth the effort. Like virtually every other group that has ever attempted to overcome bigotry and oppression, black Americans in the pre-*Brown* period understood that their fate depended in large measure upon

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72. W.E. Burghardt DuBois, *The Talented Tenth, in* THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE AMERICAN NEGROES OF TO-DAY 31, 33 (Mnemosyne Publishing, Inc. 1969) (1903).

73. MCNEIL, *supra* note 2, at 217 (quoting Houston).

74. 347 U.S. 483 (1954).

75. Rosen asserts that critical race theorists "[r]eject[ ] the achievements of the civil rights movement." Rosen, *supra* note 16, at 27. Frank Michelman amply demonstrates that this charge is specious. Michelman, *supra* note 41, at 726-27.

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their own efforts to achieve liberation. Although black lawyers were certainly not the only participants in the civil rights movement—many whites also fought valiantly for the cause of equal rights—the fact that Houston's social engineers were prepared to self-consciously and forthrightly represent their race in the corridors of legal and political power has substantially improved the status of every black American, including those who continue to suffer in poverty and degradation.

Moreover, by dismantling de jure segregation, Houston and Marshall removed a powerful blight on the legal profession's age-old claim that lawyers are connected to justice. It is now common for liberals and conservatives alike to point to the crusade leading up to *Brown* as definitive proof that the legal profession, notwithstanding all of its connections to power and the status quo, in fact stands on the side of justice for all citizens. As a result, Houston's race-conscious lawyering strategy has ironically become a key element in the defense of the bleached out professional norm that "[l]awyers, as guardians of the law, play a vital role in the preservation of society."[76]

Contemporary proponents of representing race models of lawyering implicitly assert that if this generation of black lawyers adopted something like Houston's social engineering model, their rejection of bleached out professionalism would produce similar benefits for the justice claims of today's black community. As I indicated at the outset, I share this view. This does not mean, however, that black lawyers should simply embrace uncritically every aspect of the Houstonian model. The legal campaign against de jure segregation took place during an era quite different from our own. To name only the most obvious distinction, American apartheid was ever present and unambiguous, strangling the prospects of all blacks regardless of status or position. Under these conditions, a call for black lawyers to act primarily as "'interpreter[s] and proponent[s]'"[77] of black rights and aspirations was arguably justified. By almost anyone's accounting, however, the contemporary racial landscape is significantly different than the one confronting Houston and Marshall. It is against this landscape that we must examine the justifications for representing race models of lawyering.

In theory, representing race accounts need not require the level of total commitment to racial issues that Houston sometimes seemed to suggest was required of the black lawyers in his day. For example, none of the theorists cited above suggest that the only appropriate

76. MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl., para. 2 (1980).

77. MCNEIL, *supra* note 2, at 218 (quoting Houston).

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role for black lawyers is the kind of full-time civil rights practice for which Houston prepared his social engineers. Nor must representing race advocates completely reject the moral force of the profession's traditional bleached out norms. Both Houston and Marshall, for example, consistently demonstrated respect for the profession's rules and practices even as they pursued their explicitly race-conscious strategy for social change.

In practice, however, representing race models tend to treat race as the central feature in the lives of black lawyers—a feature that overwhelms other professional commitments. This is clearly true in the popular debate about the obligations of black lawyers. In that debate, racial loyalty is often presented as an "either/or proposition—you're either for us or against us, a race man or a sellout."[78] In such a world, as the popular portrayal of the Darden Dilemma amply demonstrates, when a black lawyer conforms his conduct to the profession's bleached out values, he "risk[s] his status as an authentic black man—and in the race man ideology, to be an authentic black man is to put the black race first."[79]

Academic supporters of representing race models reject this sharp dichotomy. For example, in an important essay, Margaret Russell argues that black lawyers must move beyond the "false dichotomies" of "sellouts" and "race cards" in order to find meaningful ways of representing their clients and their communities.[80]

Nevertheless, a good deal, although by no means all, of the scholarship in this area tends to minimize the importance of a black lawyer's professional obligations relative to those connected to her racial identity. For example, in a provocative article, Anthony Alfieri argues that criminal defense lawyers such as those who defended the young black men accused of beating Reginald Denny have an ethical obligation not to employ narratives of racial deviance that seek to excuse violent conduct by pointing to the overall violence of inner-city neighborhoods.[81] As Robin Barnes points out, such an ethical obligation would constitute an important departure from the traditional standards of zealous advocacy generally mandated for criminal defense lawyers.[82] Paul Butler's proposal that black jurors should vote to ac-

78. Elijah Anderson, *The Precarious Balance: Race Man or Sellout?*, *in* THE DARDEN DILEMMA, *supra* note 33, at 114, 116.

79. *Id.* at 128.

80. *See* Russell, *supra* note 24, at 773.

81. *See* Alfieri, *Defending Racial Violence*, *supra* note 65, at 1306 (arguing that the use of narratives of racial deviance bolsters racial stereotypes and discrimination against blacks).

82. *See* Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 788-89 (1996).

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quit black defendants accused of non-violent crimes regardless of the evidence of their guilt suggests a similar view that the role obligations of blacks—in this case the obligation of jurors to base their decisions on the evidence presented—ought to be subservient to the more general obligation to serve the cause of racial justice.[83]

Even Margaret Russell's analysis of Darden and Simpson, although rejecting the popular dichotomy between sellouts and race men, suggests that race is the most important factor in the professional lives of black attorneys. Thus, Russell argues that given pervasive and systematic racism in the American justice system, every case involving a black lawyer "is at some level a 'race case.'"[84] As a result, Russell concludes, race is often the defining feature of a black lawyer's professional identity.[85] Nor does Russell believe that existing professional norms are likely to play much of a role in helping black lawyers resolve issues such as those that confronted Darden and Cochran. Instead, Russell proposes "community-based reflection" within the black community as the method for determining what it means for a black lawyer to represent her race.[86]

It is important not to overstate the extent to which these theorists suggest moving away from bleached out professionalism. Although virtually all critical race theorists reject colorblindness as an accurate depiction of empirical reality, many—indeed most—concede that it may be an appropriate normative ideal in certain circumstances.[87] Moreover, many of those who write about the intersection between race and the legal system make no distinction between the responsibilities of minority and white attorneys.[88]

Nevertheless, these theories share one crucial difference from the strong version of bleached out professionalism described in the preceding section. Regardless of their other differences, these scholars tend to share the view, summed up by Anthony Alfieri, that

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83. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 715 (1995).

84. Russell, *supra* note 24, at 787.

85. *See id.* at 767 (arguing that "[a]ttorneys of color often find that they are identified, categorized, and evaluated first as members of their racial group, and only secondarily—if at all—as lawyers").

86. *See id.* at 785 (expressing hope that the so-called Darden Dilemma will be resolved "through community-based reflection, rather than through the norms of mainstream legal practice").

87. Michelman, *supra* note 41, at 731.

88. For example, Professor Alfieri proposes a new "middle-level" ethical rule that would prohibit all criminal defense attorneys from employing narratives of racial deviance. Alfieri, *Defending Racial Violence*, *supra* note 65, at 1340-41; *see also* Cahn, *supra* note 67, at 993-95.

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"[r]epresenting race with competence and candor hinges on the strength of attorney-client identities outside of the law and ethics of lawyering."[89] For these theorists, the "master narrative" of race, not professionalism, stands at the core of the lives of black lawyers. It is this assertion about the centrality of race that has helped to fuel interest in the third perspective on the intersection of race and professional role.

C. *Personal Morality Lawyering: I Decide What Race and Professionalism Have to Do with It*

If bleached out professionalism and representing race theory provide the narrative and counternarrative for the three cases described at the beginning of this Part, personal morality accounts of the lawyer's role constitute a seldom articulated but nevertheless pervasive subtext. On some occasions, this subtext is deployed as an indictment of conduct that allegedly undermines the norms of bleached out professionalism. For example, in a letter to Johnson concerning his decision not to seek the death penalty in any case, Governor Pataki stated, "'I cannot permit any District Attorney's personal opposition to a law to stand in the way of its enforcement . . . . No one . . . can substitute his or her sense of right and wrong for that of the Legislature.'"[90] On other occasions, black lawyers invoke personal moral commitments as a defense to what are often perceived to be the all-encompassing demands of either race or role. For example, in responding to pleas from his NAACP colleagues that he "defer to another lawyer to handle matters involving the Klan,"[91] Anthony Griffin repeatedly emphasized his personal commitment to a near-absolutist interpretation of the First Amendment.[92] Similarly, Darden defends his angry exchanges with Johnnie Cochran on the ground that he had "'responsibilities as a human being that were just as important as the responsibilities of being an African American.'"[93] Regardless of whether arguments of

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89. Alfieri, *Lynching Ethics*, *supra* note 65, at 1094.

90. *See* Jan Hoffman, *Prosecutor in Bronx, Under Fire, Softens Stance Against Execution*, N.Y. TIMES, Mar. 20, 1996, at A1, *available in* LEXIS, News Library, Nyt File (quoting Pataki).

91. Kevin Moran, *Representing Both NAACP and Klan; General Counsel Is Criticized for Taking Case*, HOUS. CHRON., Aug. 23, 1993, at A11, *available in* LEXIS, News Library, Arcnws File.

92. *See* Moran, *supra* note 31 (noting Griffin's strong commitment to the ACLU and its staunch defense of the First Amendment). For a discussion of why the ACLU's view is not the only plausible interpretation of the First Amendment, see Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 19, at 1044-49. Griffin's support of the ACLU's interpretation is therefore better characterized as a personal moral commitment rather than a professional obligation. *See id.* at 1058-60.

93. Cose, *supra* note 33, at viii (quoting Darden).

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this kind are deployed as a sword challenging conduct deviating from the standards of bleached out professionalism, or as a shield against charges of disloyalty, the real or presumed personal moral commitments of the relevant protagonists often constitute an important, though frequently unarticulated, part of the public narrative surrounding cases such as the ones we are discussing.

As with the modern reemergence of representing race theory, the roots of this third frame for understanding the conduct of lawyers can also be traced to the academy. Unlike the former model, however, the origins of what I am calling personal morality lawyering lie outside of the law schools.

Academics from the rest of the academy have always been skeptical of the legal profession's claim that lawyers inhabit a strongly differentiated social and ethical universe. This skepticism comes from two quarters. The first is sociology. Those who assert that a lawyer's role obligations supersede other considerations that ordinarily would govern her conduct implicitly assume that there is some connection between the status of being a "professional" and the normative commitments that all "professionals" should share.[94] Many contemporary sociologists, however, are skeptical of the idea that it is possible to identify stable and defensible criteria for classifying which occupations are entitled to be treated as "professions."[95] Instead, these theorists tend to view the fact that lawyers and doctors are considered "professionals" and are, therefore, presumptively entitled to craft their own standards of conduct, as nothing more than the product of concerted and successful political struggle by these groups to carve out a privileged status vis-à-vis the state and the rest of civil society.[96] Viewed from this perspective, bleached out professionalism is little more than a tactic used by lawyers to free themselves from public scrutiny and control by government officials, clients, religious leaders, or anyone else who might want to question or constrain the legal profession's right to act as it sees fit.

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94. *See, e.g.*, Eliot Freidson, *Professionalism as Model and Ideology*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 5, at 215, 219-25 (asserting that professions revolve around "*the central principle that the members of a specialized occupation control their own work*"); Pepper, *supra* note 15, at 614 (linking lawyers' "amoral" roles to their status as "professionals").

95. *See, e.g.*, MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS x-xviii (1977) (asserting that the professional phenomenon lacks clearly defined boundaries).

96. Richard Abel has been the most frequent and the most effective advocate of this criticism of the legal profession. *See* ABEL, *supra* note 39, at 112-17 (arguing that by controlling the legal market, lawyers are able to maintain their privileged status); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 653-57 (1981) (same).

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The second critique comes from philosophy. Many philosophers are skeptical about the kind of "role differentiated morality" that underlies bleached out professionalism.[97] These theorists are particularly suspicious of claims that professionally created role obligations legitimately exempt lawyers from the moral duties that apply to ordinary citizens.[98] Role theory, according to these critiques, distorts human psychology by encouraging lawyers to ignore, or at the very least to suppress, "the still small voice of conscience" that flows from seeing the moral consequences of actions taken in their professional role.[99] Moreover, when coupled with the increasing hierarchy and isolation that characterizes the modern bureaucratic state, this stunting of moral imagination risks producing situations in which *no one* feels morally accountable. Thus, bad consequences simply become the unfortunate but unavoidable result of everyone "doing their job."[100]

Together, these intellectual and empirical trends have persuaded many academics that lawyers should look to their own personal moral values as a source of guidance for resolving the ethical problems that they encounter as lawyers.[101] Indeed, the view that morality plays a central role in a lawyer's professional life has become so widespread that one academic asks whether "a good lawyer [can] be a good person if that person is also not a good philosopher."[102]

Like bleached out professionalism and representing race theories, personal morality models of lawyering seek to protect values important to our legal order. As David Luban cogently argues,

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97. David Luban is the best known and most influential of these critics. *See* LUBAN, *supra* note 9, at 104-27; David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER 83 (David Luban ed., 1983).

98. *See* LUBAN, *supra* note 9, at 104 (questioning whether a social institution, such as the adversarial system, cannot justify acts that would be immoral if performed outside the institution).

99. *Id.* at 122; *accord* Wasserstrom, *supra* note 6, at 2 (arguing that role morality leads lawyers to live in a "simplified moral world").

100. LUBAN, *supra* note 9, at 123-24; *accord* Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977) (cynically claiming that "[a] lawyer is a person who on behalf of some people treats other people the way bureaucracies treat all people—as nonpeople").

101. *See generally* Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 LOY. L.A. L. REV. 1543 (1996). *See also* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083-84 (1988) (noting and criticizing the tendency among many legal academics to juxtapose "morality" with standard accounts of professionalism). My own work has also been substantially influenced by these sociological and philosophical criticisms. *See generally* David B. Wilkins, *Redefining the 'Professional' in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 241.

102. Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 9 (1995).

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professional norms must always be justified in terms of some wider set of moral criteria, lest we succumb to the proposition, discredited since Nuremberg, that any moral excess can be justified by the assertion that one was simply "doing one's job."[103] There is ample evidence that many contemporary professional norms fail to pass this test.[104] By counseling lawyers to subject the profession's norms and practices to critical moral scrutiny, personal morality accounts help to prevent professionalism from becoming merely a cover for lawyer professional self interest.

Moreover, regardless of the content of professional norms, ethical judgment for lawyers inevitably involves more than simple rule following. Lawyers are hired as much (if not more) for their judgment as for their technical expertise. Good judgment, as Anthony Kronman has recently argued, is a trait of character intimately connected with moral personality.[105] By highlighting the importance of moral reflection, personal morality accounts therefore potentially serve important client interests as well as those of the profession.

As with the other two approaches I have previously described, there are a broad range of possible approaches for integrating moral reflection with professionalism. Some of the most influential of these accounts link moral deliberation to achieving public goods that are in some sense independent of a lawyer's own personal moral commitment. Anthony Kronman, for example, argues that the "lawyer-statesman" should direct his professional efforts toward achieving the collective good of "political fraternity" rather than the lawyer's personal understanding of what justice requires.[106] In a different vein, Deborah Rhode combines her argument that lawyers must assume personal moral responsibility for their professional actions with a call for the creation of structures within and across legal institutions in which lawyers can develop systematic methods for constructing a new normative discourse for identifying and resolving ethical problems.[107] Although neither Kronman nor Rhode believes that the limitations they propose will produce determinate answers to the difficult moral questions that lawyers face, both of their approaches nevertheless

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103. LUBAN, *supra* note 9, at 104-27.

104. *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

105. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 2-3 (1993) (describing "judgment" as the core of the legal profession's traditional ideal).

106. *Id.* at 94.

107. *See* Rhode, *supra* note 104, at 643-47; *see also* Deborah Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994).

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share one of bleached out professionalism's central aspirational goals: the desire to produce a professional consensus about how to reason about (although perhaps not how to decide) ethical questions in the practice of law.

Other personal morality theorists, however, are much more hostile to the basic tenets of bleached out professionalism. Whereas traditional defenders of bleached out lawyering view the formal ethics rules as the very essence of lawyer professionalism, some personal morality proponents characterize these same commands as merely "the law of lawyering," which has little or nothing to do with ethical conduct.[108] Nor do these critics agree that the proper goal of legal education is to create lawyers who believe that "their relationships with their clients will be influenced only by their adoption of the professional value system."[109] Instead, these theorists call on educators to emphasize the "personal responsibility" dimensions of lawyering by encouraging students to reflect critically on their own moral values.[110] As John Mixon and Robert Schuwerk make clear, getting students to draw on their personal background and experiences is central to this enterprise.[111]

To be sure, even these personal morality theorists do not reject bleached out professionalism completely. As Christine Venter acknowledges, for example, "[c]lients and the rest of the profession have certain expectations that lawyers will act" in conformance with commonly articulated professional rules.[112] Nevertheless, the emphasis of this approach is substantially different. For those in this camp, the core issue in legal ethics is the "contrast between the profession's

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108. *See, e.g.*, James R. Elkins, *Ethics: Professionalism, Craft, and Failure*, 73 KY. L.J. 937, 946 (1985) (calling legal ethics a "limited, bastardized version of ethics, an ethics culled from the ethos of professionalism"); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 963 (1987) (arguing that "[m]ost of what American lawyers and law teachers call legal ethics is not ethics").

109. Christine Mary Venter, *Encouraging Personal Responsibility: An Alternative Approach to Teaching Legal Ethics*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 287, 289-90.

110. *See, e.g., id.* at 288.

111. *See* John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 87, 108-09 (describing the use of "family of origin" theory in a course on "personal and professional responsibility"). Although the approach of Mixon and Schuwerk may be more expressly personal than others, given the widespread acceptance of moral pluralism—and in many quarters moral relativism—those who subscribe to "personal morality" accounts of lawyering inevitably reject strong forms of bleached out professionalism. *See* Venter, *supra* note 109, at 289-90 (advocating critical moral evaluation of the concepts of professionalism as opposed to simple memorization of the code of legal ethics).

112. Venter, *supra* note 109, at 290 n.12.

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ethical rules . . . and one's own values or morality."[113] Although "personal morality" theorists do not believe that such conflicts will always be resolved in favor of "one's own values," it is nevertheless clear that personal morality, not bleached out professionalism, stands at the core of their understanding of the lawyer's role.[114] It is this strand of personal morality theory that has had the most influence on the kind of cases I am discussing here.

As the statements by Griffin and Darden quoted at the beginning of this subpart underscore, one way that black professionals have sought to escape the stark dilemma of the "sellout or race man" trope is to insist that questions such as this are primarily a matter of personal moral commitment. Thus, as I noted at the outset, Stephen Carter argues that the question whether a black lawyer has fulfilled his obligations to the black community "is something personal"; a choice that is "insulated from the cruel suggestions that we have left our people behind, because only *we* know that."[115]

The claim that the proper balance between professional and race-related obligations is a matter of personal choice bears important similarities to the more "personal" approaches to personal morality models of lawyering. Consider, for example, Mary Daly's account of how she would decide whether as a lawyer she would violate the confidences of a young colleague who asks Daly's advice about whether the young lawyer should disclose a client's confidence in order to save an innocent person on death row:

> What happens if [the lawyer's] professional and personal value system gives greater weight to confidentiality [than my own]? What if she is morally comfortable with the "lawyer's role" and with the course of conduct proscribed by the black-letter texts? In this event, I am left to my own moral musings . . . .[116]

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113. Kathryn W. Tate, *The Hypothetical as a Tool for Teaching the Lawyer's Duty of Confidentiality*, 29 LOY. L.A. L. REV. 1659, 1659 (1996).

114. Even David Luban, who does not reject the moral weight of a lawyer's role obligations, characterizes these constraints in distinctly "moral" (as opposed to "legal") terms. *See* David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 264 (1996) (offering a "morality-morality" description of role conflict in which legitimate role obligations such as confidentiality are part of the "natural law of lawyering" that would exist "even if there were no rules of legal ethics").

115. *See* Carter, *supra* note 3, at 78.

116. Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1627 (1996).

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Lawyers who resolve conflicts between professional and moral values in the manner that Daly describes are likely to treat conflicts between their professional and race-related obligations in a similar manner. In both instances, personal moral convictions are likely to dominate all other relevant considerations.

Bleached out professionalism, representing race theory, and personal morality lawyering all offer black attorneys coherent accounts of how they should understand the relationship between their race and their professional identities as lawyers. As I have tried to demonstrate, each approach highlights values that are important to any plausible account of the lawyer's role in a society, such as ours, where race continues to structure the life chances of citizens in important ways.

The fact that each theory underscores legitimate values, however, should tip us off that none of the three is likely to constitute an adequate accommodation of race and professional role. Bleached out professionalism, representing race theory, and personal morality lawyering all seek to manage the tension between professional and race-related commitments by privileging a narrow definition of what constitutes "identity" and "role." The next two subparts demonstrate why this privileging undermines the utility of each theory.

D. Beyond Essentialism and Constructivism: Race and Identity in Modern America

Over the last decade a rancorous debate has erupted over the meaning and significance of the concept of "identity."[117] This debate, in Martha Minow's words, teeters between constructions of the self as "already there" and those that see the self as "invented."[118] I have no intention of entering—much less resolving—this debate here. Instead, I simply want to emphasize what most identity theorists concede: Neither of the commonly articulated theories about identity does a very good job of explaining the significance of racial identity in

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117. For two of the most illuminating examples of this literature, see MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997), and K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* COLOR CONSCIOUS, *supra* note 25, at 30.

118. MINOW, *supra* note 117, at 30. For examples of the former view, see LIONEL TRILLING, SINCERITY AND AUTHENTICITY 9-10 (1972), describing the view that "somewhere under all the roles there is Me, that poor old ultimate actuality," and MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982), describing and critiquing what he refers to as "the unencumbered self." For accounts of the latter view, see MARY C. WATERS, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA 22-51 (1990), asserting that many people can pick their ethnic identity from a range of options, and Stanley Aronowitz, *Reflections on Identity*, *in* THE IDENTITY IN QUESTION 111, 114 (John Rajchman ed., 1995), describing each person as an ensemble of social relations with various people in various social roles.

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the lives of black Americans, particularly black Americans such as those that concern us here, who subscribe to some version of the obligation thesis. This fact, in turn, creates substantial problems for each of the three models for integrating race and professional role discussed above.

Let us begin with the claim that identity is "already there." This view ignores the fact that the "self" I discover will have already been shaped by the environment in which I live. In Appiah's words, "We make up selves from a tool kit of options made available by our culture and society . . . ."[119] At the close of the twentieth century, race is a principal feature of the tool kit offered to black Americans.

This does not mean that race is "already there" in the sense of an unchangeable biological reality. Race, as Appiah has argued perhaps more extensively and persuasively than anyone else, is nothing more than a fiction masquerading as a scientific fact.[120] Strictly speaking, "there are no races," at least as that concept has been used to imply the existence of sharply defined biological (not to mention moral and psychological) differences among those people who are commonly defined as "black," "white," "Hispanic," or "Asian."[121]

The fact that race is not "already there," however, does not mean, as the constructivist view of identity suggests, that it can easily be discarded like some unwanted tool. To say that large-scale identities such as race or even gender are socially constructed should not be taken to mean that these group-based affiliations do not feel real or exert real power over the lives of individuals. As Martha Minow has aptly noted, "group-based differences need have no foundation in biology, or anything but historic oppressions, to make them real enough to warrant recognition and mobilization."[122]

Racial identity—and in particular *African American* racial identity—constitutes this kind of powerful social force.[123] Race exerts a major influence over every significant aspect of the lives of black

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119. Appiah, *supra* note 117, at 96.

120. *Id.* at 64-74.

121. *Id.* at 71-74.

122. MINOW, *supra* note 117, at 46; *accord* DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY 1 (1994) ("'I have noticed' . . . laments [a "telling joke" making the rounds among African American scholars] 'that my research demonstrating that race is merely a social and ideological construction helps little in getting taxis to pick me up late at night.'").

123. Once again, it is important to note that this argument may not hold for other racial minorities, such as Asians and Hispanics, and almost certainly does not hold for whites who rarely view themselves as even having a "racial identity." *See* ROEDIGER, *supra* note 122, at 12 (noting the prevalence of the attitude that "[w]hites are assumed not to 'have race'").

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Americans. It literally colors the way that we are perceived by the world at the same time that it shapes our self-perceptions. As a result, blacks are inextricably bound together, both in the sense that the actions of individual blacks impact the opportunities of other blacks, and in the manner in which the opportunities available to all blacks are tied to the fate of the black community as a whole.[124] Consequently, race is likely to be an important aspect of a black American's identity, if only to the extent that blacks seek to protect black identity from negative attacks by others.[125] The essential point is that in today's America, *race matters* in ways that inevitably structure identity.[126] This contingent, but nevertheless powerful, connection must be "recognized" by any theory that purports to treat black Americans as full-fledged participants in American democracy.[127]

The fact that black Americans find that their identity is rooted in race says little, however, about the *content* that any particular black person is likely to give to that identity. In the post-Cold War world of the 1990s, it should take little convincing to demonstrate that large-scale group identities—like social class—are far too abstract and plastic to determine the concrete choices of individuals. Nor is there any credible argument that there is a single way to be "black" or "female" or "gay" that unites all bearers of these forms of ascriptive identity.[128] As theorists from Kimberle Crenshaw to William Julius Wilson trenchantly argue, those of us who are "black" also have a gender, a social class, and a sexual orientation.[129] Even if one ascribes considerable power to these large-scale group identities, those who experience

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124. I discuss this point extensively in Wilkins, *Two Paths*, *supra* note 14, at 2000-01.

125. Thus even my colleague and friend Randall Kennedy, who has challenged the morality of all race-based pride or sentiments, has "no objection" to those who claim "racial pride" in order to demonstrate that they are not ashamed of their black identity. *See* Kennedy, *supra* note 54, at 56.

126. *See generally* CORNEL WEST, RACE MATTERS (1993). As Patricia Williams eloquently states, "I was acutely aware that the choice of identifying as black (as opposed to white?) was hardly mine; that as long as I am identified as black by the majority of others, my own identifying as black will almost surely follow as a simple fact of human interdependency." PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 10 (1991).

127. *See* Charles Taylor, *Multiculturalism and "The Politics of Recognition,"* *in* MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 25, 25 (Amy Gutmann ed., 1994); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 156-91 (1990).

128. *See, e.g.*, MINOW, *supra* note 117, at 34-38 (arguing that reducing a person to a single trait perpetuates stereotypes).

129. *See* WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE 144 (1978) (arguing that economic and political influences have made "it increasingly difficult to speak of a single or uniform black experience"); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-45 (1991) (asserting that to fully understand the complete person, all factors that shape one's experiences should be considered).

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themselves as standing at the intersection of several categories—for example, black women—are likely to ascribe different meanings to "race" or "gender" than those who do not.[130] Moreover, like every other human being, African Americans are more than simply the aggregation of a few large-scale group identities. Although discrimination and segregation are still rampant in late twentieth century America, black Americans can now be found in virtually every occupation, interest group, and geographic region in the country. Given this variation, the claim that "race" constitutes a "master identity" that necessarily structures and defines the lives of all blacks in equivalent and predictable ways is no longer plausible.

In sum, for black Americans, the relationship between race and identity is a series of seemingly unending paradoxes. Race constitutes a significant aspect of our identity without there being any consistent set of narratives that constitute black identity.[131] It affects other aspects of identity without determining them. Black Americans—like all Americans—have multiple and intersecting identities. Some are chosen for us—e.g., race, nationality, and family. Others we choose—e.g., politics, friends, and jobs. Moreover, the line between chosen and choice is both difficult to see and subject to change. (If we grow up in a house full of Democrats, do we really "choose" to be Democrats? If we embrace African American culture and styles of behavior, have we really been "forced" to be black? Can someone raised in Britain ever escape being an "Englishman in New York"?[132]) At any given time, however, important parts of those multiple selves will properly feel fixed and rooted. My point simply is that for African Americans

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130. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 157-59 (noting that black women have confronted male violence and white domination in ways that differ materially from those used by either black men or white women).

131. Cornel West is again instructive:

> [A mature black identity] assume[s] neither a black essence that all black people share nor one black perspective to which all black people should adhere. . . . Instead, blackness is understood to be either the perennial possibility of white supremacist abuse or the distinct styles and dominant modes of expression found in black cultures and communities. These styles and modes are diverse—yet they do stand apart from those of other groups (even as they are shaped by and shape those of other groups).

WEST, *supra* note 126, at 28.

132. The title comes from STING, *An Englishman in New York*, *on* NOTHING LIKE THE SUN (A&M Records 1987). While I'm at it, see also SHINEHEAD, *Jamaican in New York*, *on* SIDEWALK UNIVERSITY (Elektra Entertainment 1992), which offers a wonderful parody of Sting's tune.

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at the end of the millennium, race continues to be one of those rooted aspects of identity that helps to make us who we are.

Finally, as I indicated at the outset, for many blacks, their racial identity carries moral as well as practical significance. For many blacks, membership in the black community is an important source of human flourishing. As Stephen Carter has observed: "Racial solidarity, in the sense of self-love, is the key to our survival in a frustratingly segregated integrated professional world, just as it is the key to our survival in a frustratingly oppressive nation."[133] But even those blacks who view racial identity as an unjust burden that must constantly be challenged have moral reasons for caring about the collective welfare of other blacks. Given the link between individual opportunity and collective advancement, even those blacks who care only about their own moral right to be free from racist constraints ought to recognize a moral responsibility to participate in collective projects to end racist oppression.[134]

It is this complex sense of identity that black Americans bring to their roles as lawyers. None of the three models we have been discussing—bleached out professionalism, representing race theory, or personal morality lawyering—sufficiently accounts for this complexity. Recall that the central claim of bleached out professionalism is that *all* contingent features of a given lawyer's identity should be irrelevant to how she performs her professional role. This implies, of course, that it is possible for people to "check" other aspects of their identities at the door by simply becoming lawyers. By virtue of their professional training and socialization, lawyers are assumed to be able to *choose* to become people who view themselves only as lawyers, free from any remnants of other aspects of their identity that might influence how they perform their professional duties.

Moreover, it is not only lawyers who are presumed to subscribe to bleached out professionalism. Given the strong attachment to normative and empirical claims about colorblindness, proponents of this theory assume that those who interact with lawyers will also view individual lawyers as generic ones, without reference to particular features of the lawyer's identity. In the absence of this assumption, it is far from clear that it is either possible or desirable for lawyers to view

133. Carter, *supra* note 3, at 66.

134. *See* Martin Kilson, *Realism About the Black Experience: A Reply to Shelby Steele*, 37 DISSENT 519, 520 (1990) (arguing that even "self-identifying blacks" should recognize that if they do not "aggregate themselves into organizations and coalitions to combat the massive vestiges of American racism, no amount of . . . 'racial development' is either conceivable or attainable").

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themselves as nothing more than bleached out professionals. To take only the most obvious example, if a lawyer knows that jurors are likely to make certain stereotypical assumptions about her because she is a woman, she has good *professional* reasons for taking her identity as a woman into account when crafting her arguments to the jury. It is only if we assume that jurors, and others with whom lawyers interact, can *choose* to suppress those parts of their own identities that tend to give rise to such negative stereotypes and view the woman advocate as simply "a lawyer," that "bleached out" professionalism makes sense as a normative ideal.

Once we view racial identity as relatively rooted and salient in the lives of black Americans—in part as a result of the salience that this identity continues to have in the eyes of those who are not black—neither of these propositions is plausible. Black lawyers, even those who are strongly committed to their roles as lawyers, will have a difficult time "checking" their identities at the door. Christopher Darden is a perfect case in point. Darden repeatedly emphasized that he became a prosecutor in part so that he could "embolden my black brothers and sisters, show them that this was their system as well, that we were making *progress*."[135] Racial identity, in other words, played a crucial role in shaping Darden's sense of his own professional identity. But, as Darden soon found out, the framing of the intersection of his racial and professional identities was not exclusively, or even primarily, within his control. "[I]nstead," Darden laments, "I was branded an Uncle Tom, a traitor used by The Man."[136] Nor, in Darden's view, were whites able to look beyond "'the pigmentation of my skin.'"[137] Race, in other words, defined the way that others saw him as much or more than it defined his own self image.

Given the saliency of race in our contemporary culture, none of this should be particularly surprising. The claim that lawyers and those with whom they interact can ignore race *even if they wanted to*[138] requires believing that there is an "essential" core of rationality free from the pervasiveness of racial imagery, or that individuals can "construct" such a self out of existing cultural materials. Neither belief is

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135. CHRISTOPHER A. DARDEN WITH JESS WALTER, IN CONTEMPT 13 (1996).

136. *Id.* at 14.

137. Cose, *supra* note 33, at vii (quoting Darden).

138. Needless to say, it is far from certain that most Americans even *want* to rid themselves of their racial or gender stereotypes. My point here is that even if they did, we might still doubt whether they *could* in light of the pervasiveness of racial and gender stereotypes in our culture.

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warranted. Bleached out professionalism does not tell us how to come to terms with this reality.

Representing race theory constitutes one plausible method for filling this void. These theories rightly call attention to the importance of race in the lives of black Americans. By stressing the extent to which race dominates the lives of black lawyers, however, strong representing race accounts tend to undervalue the degree to which the decision to become a lawyer inevitably shapes a black lawyer's moral identity.

The Simpson case is again instructive. As I noted earlier, Margaret Russell divorces her examination of the manner in which race structured the famous exchanges between Christopher Darden and Johnnie Cochran from the legal and ethical merits of the lawyering strategies these two men employed.[139] This way of framing the issue, however, obscures the moral weight of voluntarily assumed professional commitments. Unlike ordinary black citizens, both Darden and Cochran made an express commitment to abide by the rules of legal ethics.[140] Consequently, in order to determine whether Christopher Darden "sold out" the interests of the black community by opposing the introduction of Fuhrman's alleged racism, or whether Johnnie Cochran "played the race card" in urging jurors to "send a message" that police racism and deception would no longer be tolerated, it is necessary to examine the legal and ethical merits of the arguments they employed.[141] Failing to do so obscures an essential aspect of their identities: the fact that both men are free moral actors capable of honoring their chosen commitments.

The consumer protection critique underscores that the public—judges, clients, victims—depend upon black lawyers, as they depend upon all lawyers, to honor their professional commitments. Black lawyers, therefore, cannot lightly dismiss professional norms that seek to protect the interests of defendants—particularly *black* defendants—accused of racially sensitive crimes. Nor should one disregard the professional norms that intend to protect the victims and potential victims—most of whom will also be African American—of black defendants accused of non-violent crimes. Strong versions of represent-

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139. *See* Russell, *supra* note 24, at 790 (noting that her "focus is neither the substance of the Simpson prosecution itself nor the relative merits of individual lawyering strategies in the context of that case").

140. *See* Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 1004 n.13 (noting that lawyers take an oath to obey the law).

141. *See* Wilkins, *Straightjacketing Professionalism*, *supra* note 19, at 796 (arguing that consideration of the merits of the arguments is essential to analyzing the "Darden Dilemma" and "Cochran Conundrum").

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ing race ethics run the risk of subordinating all of these individual interests to the greater good of the black community.[142]

Nor is there a credible argument that the legitimate constraining force of these voluntarily assumed professional commitments has been nullified by racism. Representing race theorists have performed an important service by highlighting the extent to which racism still infects every aspect of the American justice system. But the sad fact that the United States is far from achieving the ideal of "colorblind" justice does not demonstrate that the American legal system is so racist that black attorneys and other participants in the legal system should consider themselves excused from legitimate role obligations. For all of its many problems, the American judicial system is not equivalent to those operated in Nazi Germany or Apartheid South Africa. The racism in those systems arguably rendered them incapable of generating role obligations that anyone was obligated to respect—least of all Jewish or black lawyers. The United States, however, is not such a regime. Although it continues to produce systematic injustice, our legal system is capable of responding to racial injustice as well.

Indeed, it is precisely because of the racism that pervades American society that black lawyers have an acute interest in being recognized as free and equal moral actors capable of honoring their chosen commitments. As the opportunity critique underscores, the perception that black lawyers consider themselves exempt from ordinary role obligations threatens this status. To see the danger that strong versions of representing race theory pose to this crucial value, one need only imagine the likely effects of Paul Butler's proposal for black jury nullification. As many have documented, African Americans already face substantial impediments to serving on juries.[143] Butler's proposal, however, is certain to exacerbate this state of affairs. It is not inconceivable, for example, that if courts believe that black jurors are engaged in widespread race-based nullification, they might relax or perhaps even abrogate recent judicially imposed restrictions on using race as a proxy for jury selection.[144] Even if courts refrain from taking this drastic step, prosecutors would certainly increase their covert ef-

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142. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 295-301 (1997) (arguing that Butler's proposal ignores the legitimate rights of black victims); Barnes, *supra* note 82, at 788-89 (arguing that Alfieri's proposal undercuts the legitimate rights of black defendants).

143. *See, e.g.*, KENNEDY, *supra* note 142, at 227-30 (arguing that although the Supreme Court took significant steps in outlawing racially discriminatory peremptory challenges, this rule is hard to enforce).

144. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 97 (1986) (prohibiting prosecutors from using peremptory challenges to exclude jurors on the basis of race).

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forts to accomplish this unlawful, but extremely difficult to detect, result. Equally important, the legitimacy of the determinations of those blacks who do manage to serve on juries would undoubtedly be called into question even more frequently than they are today.[145]

Personal morality accounts of the lawyer's role paradoxically reinforce these problems. By emphasizing the importance of lawyers' getting in touch with their own "authentic" moral commitments, personal morality theories validate the element of choice in a black lawyer's moral personality that representing race theories tend to slight.[146] The purpose behind this recognition, however, is to put individuals in touch with the moral commitments that they had *before* becoming lawyers and to help them learn to recognize circumstances where these commitments modify (or, in extreme cases, trump) what otherwise would be considered binding professional commitments.[147] Once again, this formulation gives too little weight to collectively defined professional values. As I argue below, personal responsibility theorists correctly emphasize that common morality stands as the ultimate check on any assertion of professional ethics. To acknowledge that role obligations must always be *justified* in terms of some more general set of moral criteria, however, does not mean that the profession's articulated ethical standards are entitled to no more weight than the "motor vehicle code."[148] As I have already indicated, lawyers are more than ordinary citizens; they have been given a monopoly by the state to occupy a position of trust both with respect to the interests

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145. For example, despite clear problems with the Simpson prosecution, many commentators nevertheless insist upon characterizing Simpson's acquittal as a case of nullification by black jurors. Imagine how much louder these cries would be if Butler's proposal were widely accepted.

146. Professors Mixon and Schuwerk capture the extent to which "personal morality" ethics instruction emphasizes students' understanding of their own value structure:

> The issues addressed in professional responsibility and law of lawyering courses . . . lie at the heart of students' personal relationships, personal values, and personal morality. Lapses in professional behavior are, in our judgment, at least as likely and probably far more likely to stem from those personal attributes than from ignorance of applicable professional norms. Consequently, a course in professional responsibility or the law of lawyering is falling short of the mark if it does not seek to acquaint students with those aspects of their personalities and sensitize them to the importance of such considerations in their professional lives.

Mixon & Schuwerk, *supra* note 111, at 91 (footnote omitted).

147. *See* Daly, *supra* note 116, at 1627 (arguing that a lawyer should break confidentiality to prevent an innocent person from being executed if she is "morally committed to preventing the execution of an innocent man").

148. Thomas L. Shaffer, *On Religious Legal Ethics*, 35 CATH. LAW. 393, 397 (1994) (arguing that American attorneys "should regard official 'ethics' rules for attorneys the way they regard the motor vehicle code—as an administrative regulation having very little to do with being righteous and an attorney simultaneously").

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of their clients and the public purposes of the legal framework. This status is a part of the moral identity of black lawyers.

Moreover, the rhetoric of individual reflection and personal values used by many personal morality theorists implies that moral decisionmaking is the product of "'the unencumbered self,'" free from any "'aims and attachments it does not choose for itself.'"[149] It is this "self" that cultivates values and makes commitments that must ultimately be assimilated into one's professional role.[150]

The view that moral commitments are the product of individual moral choice underestimates the important role that communal attachments—including attachments that are created without our express consent—play in the development of our moral personalities and in human flourishing more generally. As David Luban argues, "at bottom, moral deliberation takes place within communities—communities that can include friends and families, religious congregations, coworkers, or professional groups."[151] For black lawyers, the black community is an important source of moral community.

To be sure, the black community is not the only reference point for the formation of black identity. The new movement to call those of us who used to be Negroes "African Americans" implies (or at least ought to imply) that black culture in the United States is inextricably intertwined with American culture in ways that cannot be separated. Moreover, as I have already suggested, black lawyers are also *lawyers* who are, in virtue of this status, enmeshed in a professional community that is itself an important "nomos" for human flourishing.[152]

Nevertheless, given the complex interdependence between the fate of individual blacks and the fate of the black community as a whole, race continues to be an important component of identity for black Americans. Anthony Griffin's experience representing the Ku Klux Klan underscores this connection. Griffin, as I have indicated, often spoke the language of personal morality by branding as "racist" any attempt by either blacks or whites to question his personal com-

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149. Kennedy, *supra* note 54, at 56 (quoting Michael Sandel).

150. *See* William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 247 (1996) ("Moral considerations . . . are presumptively a matter for the individual decision maker to resolve privately more or less on her own.").

151. Luban, *supra* note 114, at 265-66; *accord* THOMAS L. SHAFFER & MARY M. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 25-29 (1991) (arguing that moral reflection always takes place within communities).

152. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4-11 (1983) (discussing the importance of normative communities separate from the state); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1390 (1992) (applying Cover's analysis to the bar).

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mitment to protecting the Klan's First Amendment rights. Notwithstanding these statements, however, Griffin felt an obligation to justify his actions to blacks who disagreed with his position.[153] During these discussions, Griffin took great pains to explain why representing the Klan was in fact in the best interests of the black community.[154] Despite the controversy, therefore, the black community continued to be an important reference point for Griffin's moral reflection on his decision to represent the Klan. It is this connection between individual blacks and the black community that personal morality models of lawyering fail to recognize and to respect.

Bleached out professionalism, representing race theory, and personal morality lawyering all privilege one form of identity in a manner that distorts the proper significance of racial identity in the lives of black lawyers. The next subpart demonstrates that the three models make a similar mistake about the lawyer's role.

E. Professionalism in Context

Bleached out professionalism, representing race theory, and personal morality ethics all implicitly incorporate universalist accounts of the lawyer's role. These accounts obscure important contextual distinctions relevant to a proper accommodation of race and professional role.

Bleached out professionalism is expressly premised on a unitary conception of the lawyer's role that provides little space for non-professional discretionary judgment. Thus, bar leaders and other advocates of this position speak broadly about the importance of such values as neutrality and objectivity to the "lawyer's role."[155] This formulation is consistent with the profession's long-standing commitment to the idea that American lawyers constitute a single unified profession, governed by a common set of ethical norms.[156] As a result, the profession's norms and enforcement practices either ignore differences among the tasks that lawyers perform, the clients they rep-

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153. *See* Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 19, at 1043 n.66 (citing reports that Griffin stated that he "had to respond" to those blacks who believed that he was a "crazy black lawyer in Galveston who had lost his mind").

154. *See id.* at 1044 n.68 (citing reports that Griffin justified his actions to his critics at the NAACP on the ground that safeguarding the Klan's rights was essential to the preservation of the rights of those groups who advocate for black rights).

155. *See* Pepper, *supra* note 15, at 615-19, 633-34 (presenting a broad moral justification for the amoral professional role of the lawyer based on a concept of professional obligation).

156. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 54 (1986) (identifying and criticizing this idea).

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resent, and the institutions in which they work, or treat these differences as insignificant.[157]

Moreover, the ethical norms that lie at the heart of this unitary vision are presumed to tightly script acceptable lawyer conduct. This understanding flows logically from the claim that lawyers need not consult any feature of their contingent identity—including their conscience—when deciding how to carry out their professional role. For this to be true, professional norms must fully specify how a lawyer should carry out each and every aspect of her work.[158]

Neither the image of a unitary profession nor the claim that professional norms tightly script ethical conduct accurately characterizes the American bar.[159] The traditional image of a homogeneous profession united by a common normative culture is increasingly out of touch with the realities of contemporary law practice. Those who study the profession consistently report wide disparities in the working conditions, experiences, and normative commitments of lawyers located in various segments of the legal services industry.[160] Given the growing trend towards specialization among professionals at all levels, as well as the widening gap between lawyers at the top and the bottom of the profession's status and income hierarchies,[161] these differences are likely to increase in the coming years.

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157. I have written extensively on this topic. *See* Wilkins, *Fragmenting Professionalism*, *supra* note 61 (manuscript at 71-72) (indicating that the universality of the profession's rules "implies that differences among lawyers are relatively unimportant in the area of ethical decision making"); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1151-54 (1993) (arguing that the growing specialization in the law has undermined the traditional unitary model of the profession).

158. *See* Venter, *supra* note 109, at 289 n.8 (noting that those who reject the importance of personal ethics often "take the position that because the details of appropriate and inappropriate conduct have been specified in the Rules and Code, much personal choice has been obviated").

159. I present a more complete account of the descriptive and normative failings of bleached out professionalism in Wilkins, *Fragmenting Professionalism*, *supra* note 61 (manuscript at 4-5) (arguing that "bleached out" professionalism fails as both a description of the legal profession's current ideals and as an appropriate aspirational goal for all lawyers).

160. *See, e.g.*, JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982) (arguing that the legal profession is divided into two "hemispheres" comprised of lawyers who represent corporate clients and those who primarily represent individuals); DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 103-05 (1974) (suggesting that plaintiffs' personal injury lawyers have different ethical values than the bar as a whole); ABEL, *supra* note 39, *passim* (describing stratification and differentiation within the bar).

161. On specialization, see HEINZ & LAUMANN, *supra* note 160, at 358 n.72 (noting the recent growth of "specialty firms"). On the growing income gap, see ABEL, *supra* note 39, at 164-65 (describing the increasing degree of differentiation within the legal profession).

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These differences undermine the strong version of the bleached out model we are considering here. For example, Robert Johnson, the black lawyer who refused to seek the death penalty, is the elected District Attorney for the Borough of the Bronx.[162] Although there are many competing points of view regarding the ethical obligations of elected officials, the strong version of bleached out professionalism is inconsistent with important aspects of representative democracy.[163]

When citizens choose for whom to vote, they have a legitimate interest in knowing something about the candidates' moral, political, and social views, as well as their membership in (and relationship to) various communities, including those defined by ascriptive characteristics such as race, religion, gender, or social class. These considerations are precisely those contingent features of individual identity that are ruled out of bounds by bleached out professionalism. While we might hope that individuals would not base their voting decisions solely on these factors, the prevalence of block voting by race and other characteristics underscores the importance that many citizens continue to place on what Hanna Pitkin refers to as "descriptive representation."[164]

Nor can one neatly separate a publicly elected District Attorney's role into a "legal" and an "electoral" component. Prosecutors exercise tremendous discretion in the performance of their legal responsibilities. This discretion includes a wide range of flexibility about such core legal matters as "which crimes to investigate, who to charge and what sentencing deals to offer."[165] Voters have a legitimate right to select prosecutors who will exercise this discretion in ways that the voters see fit.

Needless to say, there are constraints on the extent to which the prosecutor should respond to the voters' wishes. A black prosecutor would no more be entitled to refuse to prosecute black defendants just because his constituents unanimously supported this moratorium than a black mayor would be entitled to spend public moneys on only black schools because he had a similar mandate. Nevertheless, appropriate law enforcement priorities, like the distribution of school funding, is a public policy issue about which voters have a legitimate right

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162. *See supra* text accompanying note 23.

163. Hanna Pitkin's classic work remains the most comprehensive and influential account of the various models of representation. *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

164. *Id.* at 60-61.

165. Jan Hoffman, *Death Penalty Raises Issue of Obligation of Prosecutor*, N.Y. TIMES, Mar. 17, 1996, § 1, at 33, *available in* LEXIS, News Library, Curnws File.

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to inquire. An elected District Attorney such as Johnson, therefore, has an obligation to explain his priorities to the voters and to take their views about priorities into consideration when exercising the discretion granted him under the law.

Even within the core of the lawyer's role—client representation—the "bleached out" model fails to capture important aspects of the professional work of certain attorneys. Consider Anthony Griffin's position as the unpaid general counsel of the NAACP. In this case, Griffin's identity as an African American committed to the cause of equal opportunity for blacks is obviously central to any proper understanding of how he is to perform that professional role. Indeed, as David Luban eloquently argues, to be a "cause lawyer" is to reject the idea that one is morally unaccountable for the content of one's work.[166] By definition, morally accountable lawyers cannot bleach out those contingent aspects of their identity that are central to their moral personality. As I have already indicated, for Anthony Griffin, his identity as an African American is an important part of his moral identity.

To say that some lawyering roles allow or even require lawyers to express aspects of their racial identity in their work does not mean that *all* such roles are equally accommodating. Representing race theory, by treating every case involving a black participant as a "race case," obscures these distinctions.

Consider, for example, the role of the judge. As Margaret Russell documents, many black federal judges have at one time or another been accused of being incapable of impartially ruling on claims involving race or sex discrimination.[167] In response, these judges consistently demand that they be accorded the same respect accorded to white judges, who, because of their professional commitment to impartiality and due process, are presumed to be able to set aside personal feelings and rule on cases according to the evidence and the law.[168]

The difference in the reactions of these black judges and, say, Anthony Griffin, to the charge that either the judges or Griffin are likely to "favor" the interests of other blacks in their professional roles is directly traceable to differences in the roles themselves. Impartiality is central to the role of the judge in a way that it just is not to the

166. LUBAN, *supra* note 9, at 161-66.

167. *See* Russell, *supra* note 24, at 775-79 (recounting instances of black judges responding to race-based disqualification motions).

168. For a particularly eloquent statement of this commitment to professionalism, see *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 388 F. Supp. 155, 163-71 (E.D. Pa. 1974).

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advocate's role—particularly a cause lawyer like Griffin. As a result, the consumer protection critique—i.e., that excluding reference to non-professional identity is necessary to protect the legitimate rights of those who consume legal services—is particularly powerful in the former context.

This does not mean that those who become judges must see themselves as thoroughly bleached. Once again, the refusal of black judges to submit to per se disqualification in race cases is instructive. These judges did not take the view that their race was *irrelevant* to their professional lives. To the contrary, in dismissing the view that he could not be impartial in race cases, Judge Higginbotham made it perfectly clear that he viewed his identity as a black man committed to the struggle for racial justice as central to his personal *and* professional identity. He therefore insisted that, as a black judge, he felt a special obligation to speak out on issues of racial injustice.[169] Moreover, these judges are also quick to point out that *white* judges also have a racial identity that arguably informs their professional role.[170] All of these observations are inconsistent with bleached out professionalism.

Personal morality models also tend to discount contextual differences among lawyering roles. These models uniformly characterize the "law of lawyering" as at best entitled to a weak presumption of validity, a presumption that should give way when there are good moral reasons for violating the professional norms.

The claim that professional norms are uniformly entitled to little or no weight ignores important contextual differences among professional norms. Partly as a result of criticisms about the insularity and self-interestedness of traditional "self-regulation," bar officials are increasingly having to share rulemaking and enforcement authority with a broad range of state and private officials.[171] The presence of these knowledgeable third parties has already had an important impact on the content of professional norms,[172] and is likely to continue to do so in the future. This broadening of the regulatory process increases the moral weight of particular professional norms.

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169. *See id.* at 163-66 (acknowledging his "pride in [his] heritage" and his obligation as a black judge to speak out on issues of racial injustice).

170. *See* Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975) (noting that everyone—not just black women—has a race and a gender).

171. *See generally* Special Issue, *Institutional Choices in the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996) (discussing different methods for regulating lawyers).

172. *See* Wilkins, *supra* note 9, at 810-22 (noting that especially with ambiguous rules, enforcement parties invariably impact the meaning of professional norms).

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The NAACP's decision to fire Anthony Griffin underscores the importance of context in determining the moral weight of professional norms. Recall that Griffin defended his decision to represent the Klan in part on the basis of his strong personal commitment to the ACLU's near absolutist position concerning the scope of the First Amendment. The leadership of the Port Arthur branch of the NAACP, however, took a different position. They believed that it was possible to draw a principled line between the right of a terrorist organization like the Klan to keep its membership secret in the face of a legitimate state investigation into documented acts of violence committed by Klan members and the NAACP's right to keep its own list confidential. As a result, NAACP officials felt that Griffin's simultaneous representation of both the Klan and the NAACP constituted a conflict of interest. The organization therefore requested that Griffin stop representing the Klan. Griffin refused.

In a different context, Griffin's refusal may well have been justified. Although the case is not free from doubt, Griffin's simultaneous representation of both the Klan and the NAACP may not have amounted to a traditional conflict of interest, because the NAACP was not a party to the underlying desegregation case that gave rise to the state's attempt to obtain the Klan's membership list.[173] Under this interpretation, Griffin at most had a "positional conflict" stemming from the general philosophical opposition between the NAACP and the Klan. In the context of private clients, this kind of positional conflict is of dubious ethical standing. For example, some large law firms prohibit their lawyers from doing pro bono or law reform projects in any area where the representation might create precedents that might one day adversely affect the interests of the firm's paying clients.[174] Given these adverse consequences, the norm against positional conflicts is, at most, only weakly justified.

The NAACP, however, is not a private client. It is an advocacy organization whose sole interest is its "positions." When one of its lawyers subverts the organization's positions, it suffers an injury every bit as severe as when its economic interests are attacked. Consequently, the norm against representing positional conflicts is strongly justified in this context. Griffin should have taken this strong contex-

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173. It is, however, possible that Griffin did have a direct conflict because his representation of the Klan adversely affected his ability to recommend that the NAACP intervene in the state proceeding on behalf of the black residents. I explore this issue in more detail in Wilkins, *Race, Ethics, and the First Amendment, supra* note 19, at 1060-64.

174. *See* John S. Dzienkowski, *Positional Conflicts of Interest,* 71 TEX. L. REV. 457, 531-35 (1993).

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tualized justification into account when deciding whether to honor the NAACP's request that he stop representing the Klan. Personal morality theory, by encouraging Griffin to view the issue in terms of his personal belief in the First Amendment versus a generalized (and morally problematic) professional injunction against representing positional conflict, fails to give adequate weight to the NAACP's legitimate interests.

The claim that the rules of professional conduct tightly script lawyer conduct is similarly false. In many areas, such as whether to represent a particular client or to reveal confidential information to prevent serious bodily harm to an innocent person, professional norms grant lawyers wide discretion to determine the correct course of conduct.[175] Moreover, even when professional norms purport to mandate a particular course of action—for example, the prohibition against "frivolous" claims or the injunction against charging more than a "reasonable" fee[176]—the frequent use of vague, ambiguous, or contradictory terms means (as a practical matter) that lawyers must render their own judgments about the substantive reach that they will give to these commands.

Finally, professional norms simply do not cover many areas at the core of contemporary law practice. For example, despite the fact that most lawyers now practice inside organizations, the ethics rules say virtually nothing about relations among lawyers. Moreover, these rules and other standard accounts of lawyer professionalism assume that what clients want—and what lawyers give—is advice about how to "secure and protect . . . legal rights and benefits,"[177] as opposed to advice about moral, economic, or social issues. This characterization, however, oversimplifies the complexity of many lawyer-client interactions. For example, in their study on divorce lawyers, Sarat and Felstiner conclude that what the clients of these attorneys really want is for their lawyers to offer them help with, or at a minimum compassion about, the real-life troubles that the client has suffered as a result of

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175. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1980) ("A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client . . . ."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992) ("A lawyer *may* reveal such [confidential] information . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . ." (emphasis added)).

176. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (establishing factors for the determination of "reasonable" fees); *id.* Rule 3.1 (requiring a good faith basis for the assertion of any claim or defense).

177. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1.

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the irretrievable breakdown of the marriage.[178] At the opposite end of the profession's hierarchy, corporate clients are often more interested in using lawyers to maximize their long-term political, economic, or social strategies than in achieving strictly "legal" objectives.[179]

Discretion, in short, is a fundamental characteristic of the lawyer's role.[180] Individual lawyers, therefore, must decide how they will exercise this power.

Proponents of bleached out professionalism offer higher-order professional norms such as partisanship and client loyalty as the antidote to the problem of professional discretion.[181] As I will argue below, fundamental norms of this kind do provide important touchstones for grounding a lawyer's professional judgment. Even these capacious principles, however, cannot resolve all discretionary questions. Consider, for example, the question whether a lawyer should enter into a particular lawyer-client relationship. More important, as Robert Gordon makes clear, resolving all discretionary questions by slavishly promoting the client's interest effectively undermines the very rule-of-law values allegedly promoted by bleached out professionalism.[182] Thus, lawyers must look to other sources to fill out the discretion inherent in their role. The various contingent features of identity deemed irrelevant by bleached out professionalism are obvious candidates for this task.[183]

The fact that non-professional identity is relevant to how a lawyer exercises her professional discretion, however, does not tell us

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178. *See* Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 L. & SOC'Y REV. 737, 764-67 (1988) (reporting that what many divorce clients really want from their lawyers is compassion and understanding).

179. Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 5, at 230, 251-53; *accord* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 119-22 (1974) (describing how corporations use lawyers to achieve their non-legal objectives).

180. *See* KRONMAN, *supra* note 105, at 2-3 (describing "judgment" as the core of the legal profession's traditional ideal).

181. I have argued elsewhere that the profession's norms push lawyers to resolve all ambiguity by reference to the principle of partisanship. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 483-84 (1990).

182. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 68-83 (1988) (arguing that if lawyers slavishly followed the principle of partisanship they would quickly collapse the entire legal framework).

183. *See* Griffin, *supra* note 38, at 1255-57 (arguing that the most important role religion plays in the lives of lawyers is as a source of norms for filling out the discretion inherent in the lawyer's role).

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whether it is proper for lawyers to use this discretionary space to further particular identity-related goals. Consider the area in which lawyers arguably have the most discretion, client selection. Identity-related factors clearly have a place in how lawyers exercise this discretion. For example, Anthony Griffin's commitment to both the black community and the robust protection of the First Amendment undoubtedly influenced his decision to represent the NAACP and the Ku Klux Klan respectively. The claim that lawyers ought to be able to turn down clients solely on the basis of the client's identity (as opposed to the client's views or claims about justice), however, stands on substantially different ethical footing. As I will argue below, the argument that lawyers ought to represent their race by literally only representing people of their own race is an improper use of a lawyer's discretionary judgment.[184]

Nor is it the case, as personal morality theorists imply, that the manner in which a lawyer exercises her professional discretion is, or ought to be, immune from external criticism and review. Griffin's case is again instructive. Precisely because the rules of professional conduct grant lawyers the discretion to turn down cases, Griffin's decision to represent the Klan is itself a moral decision. If we make the additional plausible assumption that Griffin's decision to represent the Klan poses threats to the legitimate interests of the black community, for example, because a black lawyer representing the Klan sends the unintended but nevertheless powerful message that the Klan is not really a dangerous organization, or even more simply, because it improves the Klan's chances of winning the case and therefore allowing it to continue terrorizing blacks,[185] then Griffin's moral decision to represent the Klan is one into which other blacks (particularly those subject to Klan violence) have a legitimate right to inquire.

Finally, just because a particular professional obligation does not grant a lawyer the discretion to consider her identity-related moral commitments does not mean that those commitments must be sacrificed to the demands of bleached out professionalism. Conscientious objection *to* the role is, and must continue to be, a legitimate way of promoting change *within* the role.[186] Identity-related commitments are obviously central to this project. It is also clear, however, that

184. *See infra* notes 299-312 and accompanying text.

185. There is evidence to support both of these conclusions. *See* Wilkins, *Race, Ethics, and the First Amendment, supra* note 19, at 1040-43.

186. *See* MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 120-45 (1970) (discussing conscientious objection).

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these commitments must be expressed in a manner that ultimately shows respect *for* the role.

In sum, black lawyers should neither accept the totalizing claims of bleached out professionalism nor the tendency to dismiss altogether role obligations exhibited by the representing race and personal responsibility theories of lawyering. What is needed is a method for black lawyers to locate both their race-related and personal moral commitments within a framework that acknowledges the legitimate constraining power of particular lawyering roles. The next Part attempts to answer this challenge.

II. RACE-CONSCIOUS PROFESSIONALISM

Bleached out professionalism, representing race theory, and personal morality lawyering all seek to simplify a black lawyer's moral universe by privileging one set of moral considerations—professionalism, racial solidarity, personal moral reflection—over other arguably relevant considerations. A full understanding of the integration of identity and role must begin by rejecting this kind of simplification. Black lawyers simultaneously inhabit all three of these moral domains: the "professional," representing the legitimate demands that accompany their professional status as lawyers; the "obligation thesis," representing the legitimate moral commitments that black lawyers owe to the African American community; and, for want of a better term, the "personal" universe, representing the inherent right of every black lawyer to pursue her own unique projects and commitments.

Moreover, contrary to the standard accounts described in the last Part, these three domains are both "semi-autonomous" and "secondary." They are "semi-autonomous" in the sense that no one domain is supreme even within its own universe. In other words, the obligations black lawyers owe to the black community may, in certain circumstances, take precedence over particular professional norms, just as the extent to which a black lawyer can be called upon to honor race-based commitments is subject to the call of the lawyer's personal commitments and aspirations. Each domain is also "secondary" in the sense that all three are subject to the overall constraints of common morality.[187]

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187. There are, of course, many views about what constitutes "common morality." To pick only the most familiar axes, these views range from the deontological to the utilitarian, and from the universal to the culturally relative. For the purposes of this analysis, I am essentially agnostic among these competing positions. I simply mean to invoke the relatively uncontroversial position that in contemporary America, there are certain moral propositions—for example, that women and men are created as moral equals—that are

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The next three subparts describe the content of these moral realms. Subpart D discusses what happens when these worlds collide.

A. The Professional Sphere

At first blush, the boundaries of the professional sphere appear to be the easiest to delineate. The Model Rules, the Model Code, and other standard professional texts purport to provide a comprehensive guide for ethical conduct. Once we go behind this standard assumption of bleached out professionalism, however, the task of defining the scope of the professional sphere becomes more complex. As I have already indicated, the inevitable gaps, conflicts, and ambiguities in professional norms provide space for lawyers to accommodate some of the legitimate demands emanating from the obligation thesis and the personal sphere. Before this synthesis can take place, however, lawyers must come to grips with the problem of interpretation.

In a series of brilliant and influential articles, William Simon argues that the legitimacy and determinacy of professional norms depend in large part on the philosophical commitments that lawyers bring to the task of legal interpretation.[188] Simon argues that the dominant view of legal ethics rests on a form of narrow legal positivism.[189] Thus, traditional legal ethics discourse sharply differentiates "legal" from "non-legal" norms, suggesting that the lawyer's duty is entirely to the former and not the latter. Moreover, positivists only count something as "law" if it has a certain narrowly defined jurisdictional pedigree.[190] This form of reasoning, Simon asserts, privileges procedure over substance, form over purpose, and narrow over broad ways of framing legal issues.[191]

Simon goes on to argue, however, that narrow positivism is not the only interpretive position recognized by the law. Instead, he argues that mainstream legal discourse also incorporates "substantivism," an interpretive strategy that rejects each of the primary attributes of narrow positivism.[192] Substantivists see legal norms as indissolubly moral and are aware that even something that has all of the jurisdictional pedigree of "law" may not be entitled to that status if it is

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not subject to reasonable dispute. I therefore only reject purely race-based subjectivist accounts of morality. *See* Wilkins, *Two Paths*, *supra* note 14, at 1995 n.56.

188. Simon, *supra* note 150, at 245, 253; Simon, *supra* note 101, at 1113-14.

189. Simon, *supra* note 150, at 220, 228.

190. *Id.* at 223.

191. Simon, *supra* note 101, at 1097, 1102, 1107.

192. Simon, *supra* note 150, at 220-22.

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inconsistent with fundamental moral principles.[193] As a result, substantivists reverse the valence on the three principal interpretive dichotomies, privileging substance, purpose, and broad framing.[194]

Simon urges lawyers to reject positivism and embrace substantivism.[195] He argues that if they do so, they will have a compelling reason to follow the standard professional injunction that they obey the law.[196] As David Luban notes, however, they will do so because Simon's approach dissolves the distinction between law and morality by arguing that anything that leads to immoral results is not "law."[197] Simon accomplishes this result by invoking the doctrine of nullification.[198] Lawyers, Simon argues, should have the same rights as judges and jurors to refuse to follow "legal" rules that nevertheless contravene fundamental moral principles.[199] Once lawyers recognize that they have this "legal" power, they will no longer see a distinction between "law" and their personal judgment about what constitutes the morally correct course of conduct.[200]

This is not the place to present a full response to Simon's provocative thesis.[201] Nevertheless, it is important to distinguish my conception of the professional sphere from the one Simon presents. This is necessary for two reasons. First, under Simon's approach, the professional sphere arguably swallows the other two moral domains. A substantivist lawyer will see no need to balance her "professional" commitments against her race-based obligations or other personal moral commitments. In that regard, she will simply view the legitimate moral demands of these latter two spheres as already implicitly incorporated into her role. Anything to the contrary—that is, any ethical command that appears to prevent her from incorporating all of the necessary elements of her racial or personal identity—can simply be dispensed with through nullification. Second, the reasoning process that Simon suggests for professional commands is similar to the one that I endorse in the realm of race-based moral obligations. The

193. *See id.* at 231 (discussing judicial decisions to nullify outdated statutes).

194. Simon, *supra* note 101, at 1102, 1103, 1108.

195. *Id.* at 1090.

196. Simon, *supra* note 150, at 247.

197. Luban, *supra* note 114, at 261.

198. Simon, *supra* note 150, at 225-26; *see also infra* text accompanying note 202.

199. Simon, *supra* note 101, at 1091.

200. *Id.* at 1119.

201. For my prior attempts to come to grips with Simon's important views, see David B. Wilkins, *In Defense of Law* and *Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 (1996), and Wilkins, *supra* note 181, at 508-15.

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fact that I do not endorse it here, therefore, highlights important differences between the two arenas.

Simon argues that nullification and other substantivist tendencies are already a part of mainstream legal discourse.[202] I agree. But that same discourse limits natural-law-based nullification arguments to a few well-regulated areas of legal discourse. Moreover, these areas share certain important characteristics. Consider those areas where nullification is considered a part of the law (as opposed to an act of conscientious objection *to* the law): a judge's decision to refuse to enforce an outdated statute; a prosecutor's decision not to bring charges on the ground that a conviction would not serve justice; or a jury's decision to refuse to convict despite overwhelming evidence of guilt. In each of these instances, the decisionmaker's interpretive choices are on the record and subject to public review.

These procedural safeguards are an important part of the reason why the law tolerates nullification in these circumstances. To divorce nullification from these roots is to lift the practice from the conventions and understandings that give it meaning. One does not have to believe that legal reasoning is anything more than "moderately determinant" to acknowledge that there are widely shared conventions about when and how to raise various kinds of legal arguments. Operating within these conventions is one of the commitments lawyers assume in virtue of their professional role. These conventions do not endorse radical substantivism.

The fact that lawyers have made a commitment to participate in good faith in an interpretive process with certain recognized conventions and limitations differentiates the "professional" sphere from the other two moral realms with which I am concerned. As I argue below, there are no recognized authorities or conventions that govern what it means to be black. Nor does anyone "choose" to be black. By the same token, there are no widely accepted criteria for ranking or evaluating how an individual chooses among the broad range of life plans and voluntary commitments that are consistent with the basic demands of common morality. By necessity, therefore, the tools that black lawyers will utilize to determine the scope of these spheres will differ significantly from those that are appropriate for construing the demands of their professional role. As I suggest in subpart D, however, certain aspects of legal reasoning reemerge when black lawyers are faced with a conflict among these moral spheres.

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202. *See* Simon, *supra* note 150, at 239 ("Substantivism . . . pervades the mainstream of the legal culture . . . .").

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In the professional sphere, therefore, lawyers are committed to participating in good faith in the conventions and practices of legal reasoning. It is important to recognize, however, that these conventions do not mandate an across the board commitment to narrow positivism. Although Simon is correct that the dominant voices in legal ethics favor narrow positivism,[203] there are many examples in mainstream legal ethics that point in the opposite direction, beginning with the lawyer's duty to be an "officer of the court."[204] In many instances, these "substantivist" strands are sufficient to support what Robert Gordon refers to as "purposivist" lawyering: lawyering that interprets legal rules in light of their underlying purposes or social functions.[205]

Nevertheless, even a purposivist lawyer will have to concede that the law, on occasion, mandates immoral results. Consider, for example, the infamous case involving a lawyer who has been told by his client that the client committed a murder for which another man was convicted and sentenced to death.[206] As most commentators acknowledge, the "law" of professional responsibility prohibits the lawyer from disclosing his client's confidence even if it is the only way to save the life of the wrongly accused man on death row.[207] Nevertheless, most of these same commentators would breach this professional command under these circumstances—as would I[208]—not because it is not the "law," but because it would be morally reprehensible to do otherwise.[209]

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203. *See supra* note 189 and accompanying text.

204. *See* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 (arguing that ethics rules permit lawyers in certain circumstances to consider substantive outcomes).

205. *See* Gordon, *supra* note 182, at 21-24 (distinguishing "purposive" lawyering from "schizoid" lawyering).

206. *See* Symposium, *supra* note 101, at 1543-46 (discussing the varying moral and legal issues facing attorneys, clergy, and psychiatrists who have been entrusted with such a confession).

207. *See, e.g.*, Daly, *supra* note 116, at 1621-22 (discussing the ABA and its "unwavering[ ] support[ ] [of] confidentiality").

208. Even Monroe Freedman, arguably the staunchest defender of confidentiality on the planet, agrees that it is morally proper to break confidentiality under these circumstances. *See* Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Without the Was, the Will Be, or the Ought to Be*, 29 LOY. L.A. L. REV. 1631, 1631 (1996).

209. *See* Robert P. Lawry, *Damned and Damnable: A Lawyer's Moral Duties with Life on the Line*, 29 LOY. L.A. L. REV. 1641, 1654 (1996) ("If the state or the legal profession punished me for disclosing the information . . . then so be it . . . . [I]f I failed to do it, it would be because I lacked the virtue of courage, not because I doubted it was the right thing to do.").

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This last point underscores the extent to which the professional sphere is a "secondary" moral universe. The reasons for this conclusion have been eloquently and persuasively articulated by David Luban.[210] Put simply, an immoral role (or a moral role embedded in an immoral system) cannot give rise to legitimate role obligations.[211] To believe otherwise is to sanction the Nuremberg defense.[212]

This does not mean, as personal morality theorists suggest, that a lawyer's role obligations simply collapse into common morality. Even Luban concedes that the lawyer's role and the adversary system that gives it meaning are morally justified, albeit only weakly justified in certain contexts.[213] I would go even further, suggesting that the statement that our system of justice is as good as any plausible alternative is a strong, rather than a weak, justification. This endows traditional role obligations with a fairly heavy presumption of validity. As I have previously indicated, this conclusion is not undermined by the existence of pervasive racism in our justice system.[214]

Moreover, even in circumstances where a lawyer believes that common morality requires that she violate a professional command, she should do so in a manner that acknowledges the morality of the system as a whole. To stick with the example of the innocent person on death row, this means that the lawyer should do everything in her power to protect her client from the adverse consequences of the disclosure. Although the client is a murderer, he has a legal right not to be convicted by his own words.[215] Regardless of whether the lawyer personally believes that the client should be punished, the system to which she is morally committed proscribes that this can only be done through the use of certain procedures.[216] These norms—the privilege against self incrimination, due process—are analytically severable from the moral problems associated with allowing an innocent man to die. Therefore, to the extent it is possible to prevent the execution without jeopardizing the client, for example, by getting the client use immunity from the lawyer's statement or seeking a pardon from the Governor before going forward, the lawyer has an ethical obligation to

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210. *See* LUBAN, *supra* note 9, at 121-24.

211. *Id.* at 121.

212. *Id.* at 121-23.

213. *See id.* at 92 ("[T]he adversary system, despite its imperfections, irrationalities, loopholes, and perversities, seems to do as good a job as any at finding truth and protecting legal rights.").

214. *See supra* note 142 and accompanying text.

215. *See* U.S. CONST. amend. V.

216. *See id.* amend. XIV.

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do so.[217] Otherwise, the lawyer fails to treat professionalism as a separate moral sphere.

B. The Obligation Thesis

If the "professional" sphere initially appears to be the easiest to delineate, the realm of group-based moral obligations stands out as being the most difficult. The most significant questions, of course, concern whether the argument that blacks owe special *moral* obligations to something called "the black community" runs afoul of the general moral injunction to treat all persons as presumptive moral equals. As I indicated, however, for present purposes I am assuming that in principle racial obligations are morally justified *provided* that black lawyers who seek to honor this commitment can do so in a manner consistent with the legitimate constraints imposed by the consumer protection and opportunity critiques. I therefore limit my defense of the obligation thesis to responding to two objections that bear directly on these issues. The first asserts that racial obligations, even if voluntarily assumed, are inherently destructive of professional relationships. The second asserts that creating a separate sphere for "racial" obligations minimizes the importance of other forms of group-based identity such as gender or sexual orientation.

In an important essay, my colleague Randall Kennedy challenges the morality of any manifestation of racial loyalty or solidarity.[218] He argues that feelings of racial kinship inevitably undermine professional commitments to treat others as moral equals.[219] To illustrate this point, Kennedy cites the example of a black professor at a predominantly white institution who invites all of the black students to a Christmas party at his house.[220] Kennedy criticizes this effort on grounds that sound in both the consumer protection and opportunity critiques. According to Kennedy, any display of racial affection or solidarity violates the professor's professional obligation to make distinctions among students on the basis of individual factors such as "merit" or "need" rather than on ascriptive characteristics.[221] Inevitably, Kennedy asserts, the professor's "personal" affinity for his black students will seep into his professional life, if only to the extent that it sends a

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217. If it is *not* possible to prevent the execution without endangering the client, then the client's legal rights (as a murderer, the client has no *moral* right to evade punishment) must yield to the overall moral imperative to save innocent life.

218. *See* Kennedy, *supra* note 54.

219. *Id.*

220. *Id.* at 60. The professor in question is Stephen Carter at Yale.

221. *Id.*

wounding psychological message that race matters in interpersonal relationships.[222] These psychological messages, he concludes, will inevitably limit the opportunities of black students by characterizing their problems as "black problems" as opposed to problems of the institution as a whole.[223]

One can make a number of objections to Kennedy's analysis. As a preliminary matter, it is important to note that Kennedy's argument rests on an extreme form of individualism and individual achievement. Thus, Kennedy argues that the only reason why he loves his mother above other mothers is because "over time she has done countless things that make me want to love her."[224] Although this seems like an impoverished understanding of the love that a child has for his mother,[225] it cannot explain why mothers love their children. Yet, the very survival of our species depends upon mothers expressing extraordinary love and support for their children long before these newborns are able to "do" anything in return.[226] Moreover, separate and apart from the child's survival, few would deny that expressing this kind of unqualified, non-reciprocal love is nurturing for the mother as well.

These two points—that certain kinds of attachments cannot be explained by merit or individual choice, and that relationships formed by such "involuntary" commitments can be an important source of human flourishing—are relevant to Kennedy's invocation of the consumer protection and opportunity critiques. Like Kennedy, I do not want to make too much of the analogy between race and family.[227] Nevertheless, as I have suggested before, racial ties, like family ties, are an important source of human flourishing for many blacks and a necessary means of attacking the continuing vestiges of racism.[228]

The example of the Christmas dinner for black students underscores both of these points. Kennedy does not deny that the black students in this example may be "more in need" of special attention from professors because they have been systematically ignored by

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222. *Id.* at 64.

223. *Id.* at 65.

224. *Id.* at 59.

225. Indeed, a wag might be tempted to retort that since Freud it has been clear that the central question of adulthood is how to love your mother *despite* all of the terrible things that she has done to you over the years!

226. *See* Kennedy, *supra* note 54, at 58 ("Blood, as they say, is thicker than water.").

227. *See id.* (distinguishing between a family as "a small, close-knit association" and a race as "a conglomeration of strangers").

228. *See supra* notes 133-134 and accompanying text.

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white faculty. Nor does he dispute the professor's claim that both students and teacher come away from the gathering with renewed strength to face the challenges inherent in living in a sometimes alien and often hostile world. Instead, he argues that professors and students should only pursue these objectives through race-neutral means. To do otherwise violates the legitimate expectations of students and encourages whites to view problems encountered by black students as "their" problems.[229]

Race-based loyalties, however, only constitute a per se violation of the consumer protection critique if we presume that students have a legitimate right to expect that professors will not make any distinctions other than those based on individual merit. Even a casual examination of the ways universities function demonstrates that students are not entitled to this expectation. Professors routinely make categorical judgments about how they will treat students. Thus, freshman are often prohibited from taking certain courses regardless of their ability or knowledge of the subject matter. In addition, it is equally common for professor time to be distributed differentially to students on the basis of the professor's relevant competence and interests. To be sure, policies of this kind typically go unnoticed or are dismissed as mere administrative convenience. This characterization, however, should not obscure the fact that making categorical distinctions among students furthers educational goals. My point simply is that universities have good *professional* reasons for allowing professors to make categorical distinctions among students even when some of the reasons for making these distinctions stem from the faculty members' non-professional commitments.

This same logic extends to the Christmas party. As Kennedy concedes, there are good reasons to suspect that black students *as a group* have a more difficult time on many university campuses than students as a whole.[230] This fact, as Kennedy also acknowledges, gives *all* faculty members a moral reason for paying special attention to the needs of African Americans.[231] If in addition, however, we make the plausible assumption that black faculty members are uniquely situated to give special attention to these same students—for example, because

229. Kennedy, *supra* note 54, at 64-65.

230. *Id.* at 65 (referring to the "sociological fact that blacks and whites are differently situated in the American polity").

231. *Id.* at 65-66. Notice the same cannot be said about professors who pay special attention to white students. *As a group* white students are not generally disadvantaged on today's university campuses. The distributive justice concerns Kennedy endorses not only fail to license treating whites preferentially, but they expressly counsel against doing so in light of the fact that "white privilege" exacerbates, rather than counteracts, existing inequalities.

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as a matter of contingent historical fact black faculty members are more likely to have better insight into the problems black students generally encounter—then it follows that black professors have good *professional* reasons for doing so.[232] Thus, I view my efforts to make myself especially available to black students as consistent with my professional obligation to improve the overall educational experience at Harvard Law School for all students[233] as well as a partial means of fulfilling my obligation to help improve the status of the black community.

Recognizing the legitimacy of this form of race-based moral conduct will not necessarily diminish the opportunities available to black students. Kennedy correctly calls for resisting any attempt to characterize the problems of African American students as "our" problem as opposed to the university's (or society's) problem.[234] Nothing in the obligation thesis, however, mandates this result. In addition to having black students over for dinner, black faculty should also push their white colleagues to include black students in their informal dinners. At the same time, black faculty should also push African American students to become fully integrated into university life. I work hard on both of these counts, and I am confident that most black faculty members do the same.[235] To the extent that black students and faculty emerge from their mutual interaction feeling stronger and more confident, they are each more likely to be able to accomplish these beneficial results.

These justifications for race-conscious conduct on the part of black faculty members do not license every action that an African American professor might take to aid his black students. It is important to distinguish among three types of limitations. The first is professional. As Kennedy rightly surmises, there are certain actions that no faculty member should be able to take on the basis of race.[236] Professors should not give black students higher grades than white

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232. This is particularly true if, as will often be the case, *white* professors are not fulfilling their obligations to distributive justice.

233. It should go without saying that white students also benefit when educational opportunities are more equitably distributed in the university.

234. Kennedy, *supra* note 54, at 65.

235. Indeed, it is particularly ironic that Kennedy singles Stephen Carter out for criticism given Carter's skeptical views about affirmative action and other policies that might produce racial isolation or polarization. *See generally* CARTER, *supra* note 17, at 19-21, 227-28 (identifying affirmative action in America as "part of the problem" of race relations).

236. *See* Kennedy, *supra* note 54, at 60, 64 (referring to activity within the faculty member's "official duties").

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students, even if they correctly believe that other professors are unfairly downgrading the performance of African American students.[237]

The second is moral. The obligation thesis, like the professional sphere, cannot license conduct that violates the demands of common morality. As I have tried to demonstrate, Kennedy is wrong when he suggests that morality prohibits all race-based obligations.[238] He is right, however, to worry about "obligations" contemplated by "racial patriots" such as Louis Farrakhan.[239] The response to this danger is to deny that racial loyalties ought to occupy the entire moral universe. Like Kennedy, I reject the claim that because of their subordinate status, blacks cannot be "racist" or engage in the racist oppression of others.[240] This kind of conduct is immoral under any credible account of morality, and the mere fact that it is undertaken in the name of racial solidarity or group advancement changes nothing about its basic character.

Finally, proponents of race-based obligations must also recognize the personal costs that these commitments impose. As commentators have noted, the demands of being a "role model" who is responsible, if only in part, for the welfare of other blacks imposes a heavy price on black professionals.[241] Not surprisingly, all blacks seek to minimize this burden, and some seek to escape it altogether. One suspects that Kennedy and others who have written skeptically about race-based obligations are motivated at least in part by the desire not to be weighed down by these expectations.[242] They are right to do so. Racial obligations must not become so dominant or so rigidly defined that they

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237. *Id.* at 64. The letter of recommendation issue that Kennedy actually addresses is, I believe, more complex than he acknowledges. Although it would be wrong for a black professor to refuse systematically to write recommendations for white students, the fact that she may *in fact* write many more letters for black students may be nothing more than the product of her unique position in the institution—she has known a disproportionate number of black students. Moreover, if we also make the plausible assumption that black students have a harder time getting to know their professors, a black faculty member's decision to devote more of her scarce letter writing time to black students might be justified under basic considerations of distributive justice.

238. *Id.* at 56.

239. *Id.* at 66 ("[I]t is noteworthy that . . . Louis Farrakhan . . . ha[s] engaged in the most divisive, destructive, and merciless attacks on 'brothers' and 'sisters' who wished to follow a different path.").

240. *See id.* (addressing concerns of "replicat[ing] the racial alienations of the larger society").

241. *See, e.g.*, ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 14-26 (1993) (discussing the burdens on black professionals); JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE CLASS EXPERIENCE ch. 4 (1994) (same).

242. *See* Appiah, *supra* note 117, at 99 (worrying that recognizing collective identities will lead to "expectations to be met; demands will be made"); Kennedy, *supra* note 54, at 56 (noting that he rejects racial kinship "in order to avoid its burdens").

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block out the space for individual diversity and commitments. The way to achieve this objective, however, is by recognizing the existence of a robust "personal" sphere where individual blacks can pursue their own conceptions of social justice within the broad outlines of their commitment to the black community. Before describing the content of this sphere, however, it is necessary to say something more about other group-based forms of social identity.

In Part I, I argued against the "master identity" conception of the self, inter alia, on the ground that such theories tend to marginalize other important forms of large-scale socially constructed identity such as gender or sexual orientation. By limiting my discussion of group-based obligations to the moral commitments that blacks owe to other blacks, the scheme I propose appears to reinforce this marginalization.

There are two possible responses to this problem. The first is to view these other forms of social identity as falling within the "personal" sphere. A black woman, for example, might choose to advance the cause of racial justice by paying special attention to the problems of black women, or of women of color more generally. The second involves the creation of a fourth (or perhaps even a fifth) sphere to represent the legitimate moral obligations emanating from the non-racial part of a given lawyer's intersectionality.

The choice between these two strategies depends upon the weight that particular black lawyers place on these other forms of identity. With respect to gender, my interviews with black women lawyers have uncovered a range of opinion.[243] Although virtually all of these women emphasize the importance they attach to their identities as black women, and for many as women of color, many do not feel strongly connected to women's issues or the women's community more generally. For these women, their commitment to gender issues involves a personal choice about the best way for them to address inequality—both within the African American community and within society as a whole. For others, however, characterizing their commitment to gender equality as "personal" slights the centrality that these issues hold for their understanding of their own identity. For these women, gender is equally (and in some cases even more)

243. I am currently in the process of conducting close to 300 interviews with lawyers for my book on black lawyers in corporate law practice. So far, I have interviewed more than 40 African American women for this project.

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important to their identity than race. In such cases, a separate "sphere" for gender concerns appears warranted.[244]

Recognizing that some African American women might want to create a separate "sphere" for gender obligations neither falsifies the claim that there ought to be a "race" sphere nor opens the floodgates to a proliferation of other relevant moral domains. The existence of gender, class, political, and geographic differences among black Americans has yet to sever the ties that create a common, albeit richly diverse, African American culture in the United States.[245] Nor is it likely that there are many forms of social identity other than race, gender, religion, and sexual orientation, that, for black Americans, create the kind of social communities necessary to support a separate sphere of group-based moral claims.[246] Although individual black Americans exhibit a tremendous range of interests and commitments, most of these forms of identity do not group those who share them in any significant way.[247] To be sure, individuals can choose to join organizations that promote these ends—organizations that assume enormous importance for an individual's self-understanding. It is precisely this phenomenon, however, that I hope to capture in the personal sphere.

C. The Personal Dimension

If the professional sphere is the most self-evident, and the "obligation thesis" the most difficult to justify, the "personal dimension" is the most often overlooked or taken for granted. Failing expressly to account for the legitimate claims of this moral domain, however, produces serious mistakes. Without space for the personal dimension, professional and group-based obligations risk tyranny. Black lawyers

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244. In keeping with my general commitment not to generalize about the particular applications of my analysis, I make no representations about the *content* of gender-related moral obligations.

245. For a more detailed argument about why this is so, see David B. Wilkins, *Introduction: The Context of Race*, *in* COLOR CONSCIOUS, *supra* note 25, at 3, 22-24 (arguing that "black culture" is distinct from, albeit intertwined with, "American culture"); Wilkins, *Two Paths*, *supra* note 14, at 1997-98 (arguing that notwithstanding class, gender, and other differences, black Americans share an identifiable culture).

246. *See, e.g.*, Pearce, *supra* note 35, at 1631-64 (discussing the connection between Jewish identity and professional role); Rubenstein, *supra* note 20, at 1123-28 (discussing the moral demands of sexual orientation).

247. *See* Appiah, *supra* note 117, at 93 ("There is a logical category but no social category of the witty, or the clever, or the charming, or the greedy: people who share these properties do not constitute a social group, in the relevant sense."); *see also* YOUNG, *supra* note 127, at 186-87 (distinguishing between "interest groups" and "social groups," such as race and gender).

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are more than the sum total of their role obligations and racial commitments. They are unique individuals with inalienable moral claims to pursue their own desires and commitments simply in virtue of their own humanity.[248] The personal sphere attempts to capture this reality.

Few would deny the importance of acknowledging that black lawyers have a personal identity that lies outside their race and professional role. The question, however, is whether it is possible to define this dimension in a manner that does not subsume professionalism, racial obligations, or morality as a whole within the personal domain.

This challenge takes many forms. Randall Kennedy presents the most extreme version. For Kennedy, personal commitments and achievements occupy the entire moral universe.[249] Although Stephen Carter disagrees with Kennedy's rejection of all feelings of racial attachment, he too claims, as indicated by the second epigraph to this Essay, that the *content* that any individual black person gives to this racial call must be left entirely to that person's individual discretion.[250] Finally, as I have already argued, personal morality theorists suggest that professionalism is ultimately a matter of personal moral conviction.[251]

From what I have already said, it should be clear that I reject each of these challenges. Kennedy's claim that all moral obligations are voluntarily chosen or earned ultimately rests on his belief that it is

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248. Appiah, once again, states the point eloquently:

> [I]t is crucial to remember always that we are not simply black or white or yellow or brown, gay or straight or bisexual, Jewish, Christian, Moslem, Buddhist, or Confucian but that we are also brothers and sisters; parents and children; liberals, conservatives, and leftists; teachers and lawyers and auto-makers and gardeners; fans of the Padres and the Bruins; amateurs of grunge rock and lovers of Wagner; movie buffs; MTV-holics, mystery-readers; surfers and singers; poets and petlovers; students and teachers; friends and lovers. Racial identity can be the basis of resistance to racism; but even as we struggle against racism—and though we have made great progress, we have further still to go—let us not let our racial identities subject us to new tyrannies.

Appiah, *supra* note 117, at 103-04.

249. *See* Kennedy, *supra* note 54, at 56 ("I eschew racial pride because of my conception of what should properly be the object of pride for an individual: something that he or she has accomplished."). Kennedy continues: "[I]t is deeds, not blood—doing, not being—that is the morally appropriate basis for my preference for my mother over all other mothers in the world." *Id.* at 59. Michael Walzer also shares something of this view. *See* WALZER, *supra* note 186, at 7 (arguing that only those obligations that are freely chosen carry moral weight).

250. *See* Carter, *supra* note 3, at 78 (arguing that the obligation to solidarity is "something personal, a choice within a choice").

251. *See supra* Part I.C.

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possible to claim "the unencumbered self."[252] This understanding of identity, as I argued in Part I, fails adequately to account for the manner in which race inevitably shapes the identity of black Americans in today's racially charged environment. Nor should we be swayed by Carter's claim that the content of race-based obligations is solely a matter of personal choice.[253] Once one acknowledges that one has a moral commitment to the black community, one simply misconstrues the meaning of morality by suggesting that *those to whom the duty is owed* cannot question whether the duty has been sufficiently discharged. "To thine ownself be true," is, as I argue below, a crucial component of any acceptable moral regime. It is not, however, an adequate—or at least not a complete—response to those to whom moral obligations are owed. Finally, it is possible to believe that a "good lawyer can be a good person" without accepting the claim by personal morality theorists that these two states of being are identical. A lawyer becomes a good person in part by being a good lawyer: not a bleached out lawyer, and certainly not an immoral lawyer, but a lawyer who honors the legitimate moral demands of her professional role.

Although the personal sphere does not swallow the other moral domains, neither is it subsumed by them. The diversity of lawyering roles and the discretion that lawyers have within these roles, both ignored by bleached out professionalism, give lawyers substantial space to pursue personal projects. Lawyers committed to substantive moral or legal positions can become "cause lawyers." Lawyers who want to work with like-minded people have substantial (although not unlimited) freedom to construct workplaces around shared identities and understandings. And all lawyers have the right to engage clients and

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252. *See* Kennedy, *supra* note 54, at 56 ("The unencumbered self is free and independent, 'unencumbered by aims and attachments it does not choose for itself' . . . ." (quoting Michael Sandel)). Unlike Kennedy, Walzer does not believe in the unencumbered self. *See generally* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) ("Autonomy is a matter of social meaning and shared values . . . ."). Nevertheless, as I have argued elsewhere, his claim that all moral obligations must be voluntary fails to account for the fact that black lawyers have *already* received substantial benefits from the struggles of other blacks on their behalf—benefits that no black lawyer could rationally reject. As a result, basic principles of reciprocity and fair play prevent black lawyers from free riding on this mutually beneficial scheme of social cooperation. *See* Wilkins, *Two Paths*, *supra* note 14, at 2006-07. For a particularly elegant formulation of this point, see Gutmann, *supra* note 70, at 170-72. In any event, as I have already indicated in this Essay, I am only defending the "weak" version of the obligation thesis that applies to those blacks who accept the idea of race-based moral commitments. Even Walzer concedes that those who choose to act in the name of oppressed minorities assume important moral obligations. *See* WALZER, *supra* note 186, at 58-59 (describing the "moral responsibilities" of those who purport to act on behalf of oppressed minorities).

253. *See supra* note 250 and accompanying text.

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other interested parties in a dialogue about how the lawyer's identity and commitments influence the way the lawyer sees the world and how that world view does and should shape the lawyer's conduct and the profession as a whole.[254]

Nor should we allow racial obligations to swallow individual difference. There exists a tremendous range of opinion both within and outside the black community about which strategies are the most effective means to combat racial injustice. It is crucial that debate about the relative merits of these strategies be robust and wide open. Any suggestion that there is a single way to be black, or that those who do not share the standard orthodoxy are somehow not "really" black, poses a substantial threat to this important goal.

More important, black lawyers are not simply foot soldiers in the war to end racial oppression. Like every other moral agent, they have the right—and indeed the responsibility—to commit themselves to particular projects on the basis of their own wants and desires. This includes joining with like-minded people of all races and creeds to pursue issues of common interest (including racial justice) and fashioning a life plan that seeks to harmonize these diverse commitments. Ignoring or minimizing the importance of this right denies African Americans that which the civil rights movement principally aimed at securing: their integrity.

Finally, the personal sphere does not collapse into common morality. To be sure, morality sets the outer boundaries of what counts as an acceptable personal life plan. Within these boundaries, however, individuals have substantial room to shape their lives as they see fit. A contrary determination violates Kant's famous injunction to treat us all as ends, rather than solely as means.

Moreover, because the focus of the personal sphere is on an individual's understanding of her own life plan, there will be arguments that lawyers are entitled to consider here that, strictly speaking, go beyond the moral point of view. Consider, for example, the following set of familiar arguments: "if I don't do it, somebody else will"; "everyone else is doing it"; "my career depends upon it." Philosophers tend to dismiss these claims as irrelevant to the moral calculus of whether a particular action ought to be done.[255] In the personal sphere, how-

254. For a thoughtful argument for this proposition in connection with Jewish identity, see Alan M. Dershowitz, *The Vanishing Jewish Lawyer*, CAL. LAW., Sept. 1997, at 35.

255. *See, e.g.*, LUBAN, *supra* note 9, at 210 ("We . . . need not detain ourselves [with the inquiry of a hypothetical general counsel]: 'Why should *I* bear the burden [of acting morally] and risk my career?'"). "Ask not with whom the buck stops," Luban asserts, "it stops with thee. Life is unfair." *Id.*

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ever, these arguments are presumptively in bounds. The advancement of black lawyers to positions of prominence and importance is, in and of itself, a social justice issue.[256] Not only does the presence of black lawyers in elite positions help to rebut pervasive stereotypes about black laziness and intellectual inferiority, but the material and other resources that successful black lawyers acquire provide important benefits to their own families and to the community as a whole. Expecting black lawyers to fall on their swords every time they face a conflict between the obligation thesis or even their role-related ethical responsibilities and their personal interests in their own careers jeopardizes this important goal.

Of course, by saying that pragmatic arguments such as the ones outlined above are *presumptively* in bounds, I do not mean to suggest that they are always, or even often, dispositive. As a preliminary matter, a black lawyer wishing to proffer one of these justifications must first ask herself whether the pragmatic argument is in fact *true*. Is it true that "everyone else is doing it," or as will be more often the case, is it only true that some others are doing it and riding the coattails of those in compliance? Similarly, is it true that the lawyer will ruin her career if she attempts to direct a client or partner away from a course of conduct likely to be harmful to the black community, or is it simply that she does not want to do anything that might result in others' viewing her as less than a fully committed member of the team? To the extent that the factual predicate underlying a particular pragmatic argument does not hold, the presumption in favor of considering the pragmatic harm in question evaporates.

But even if it is true that following the demands of race or role poses a substantial risk to a black lawyer's career, there are circumstances where that risk ought to be borne. Certainly this is true where failing to act would violate the standards of common morality: no one should allow an innocent person to be executed even if revealing a client's confidence in order to prevent a wrongful execution is likely to damage one's professional career substantially.[257] In such cases, although the lawyer is entitled to *consider* the pragmatic argument, that argument is clearly *outweighed* by the moral consequences that would occur if the lawyer fails to act. When the countervailing duty is

256. For an elaboration of this argument, see Wilkins, *Two Paths*, *supra* note 14, at 1990-92.

257. *See supra* notes 206-210 and accompanying text. In fairness to David Luban, this is the situation he has in mind when he argues that we should reject pragmatic justifications. *See* LUBAN, *supra* note 9, at 210 (arguing that common morality required anyone with knowledge of the defects in the Ford Pinto to reveal that knowledge).

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not grounded in common morality, but instead emanates from professional norms or group membership, however, the calculus is more complex. To see why, we must look more closely at what happens when there are conflicts among the moral domains.

D. When Ethical Worlds Collide[258]

The ethical life of a black attorney involves learning how to evaluate and balance these three moral domains—the professional, the obligation thesis, and the personal—within the confines of our common moral commitments. This is clearly a complex task. The best way to understand this process is to examine carefully particular cases, which is the task I take up in Part III. In this subpart, I simply want to set out four basic ground rules that I believe should govern this process.

First, it is important to emphasize that the demands of the three moral worlds will not always be in conflict. By rejecting the totalizing claims of bleached out professionalism, representing race theory, and personal morality lawyering, I hope I have made it clear that each sphere already allows space for aspects of the others. Moreover, in some cases, the demands of one sphere will reinforce commitments in one or both of the others. Thus, Leslie Griffin argues that, for many religious believers, "[r]eligion will provide the motivation . . . to respect the ideals of the profession and to abide by the Model Code or Model Rules."[259] By the same token, a black lawyer's commitment to racial justice might lead her to be especially vigilant about honoring the legal profession's commitment to make legal counsel widely available.[260]

Second, even in circumstances where two or more of the moral spheres appear to be in conflict, a careful examination of the issues at stake can often reduce, although perhaps not eliminate, the scope of disagreement. Two standard interpretive tools should help black attorneys narrow the range of conflict. First, lawyers should employ the "principle of charity" to define the reasonable scope of each sphere.[261] Under this principle, the lawyer should give professional norms, racial obligations, and personal commitments the best *plausible*

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258. I borrow the phrase from my colleague Mary Ann Glendon. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING SOCIETY 60 (1994).

259. Griffin, *supra* note 38, at 1258.

260. For example, in a small survey of black Harvard Law School graduates, we found that black lawyers reported doing substantially more pro bono work than the national average. *See* Wilkins & Gulati, *supra* note 20, at 570 & n.278.

261. *See, e.g.*, DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION xvii, 196-97 (1984) (discussing the need to assume the correctness of alternate spheres generally).

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interpretation that is consistent with the fact that each is bounded by the legitimate demands of the others, and ultimately, by common morality.[262] Second, black lawyers should utilize conventionalist theories of interpretation, which attempt to find coherence in the practices and conventions of a given interpretive community. This allows black attorneys to "fit" the specific conduct they are examining within the "best case" understandings generated by the principle of charity.[263]

Third, in the event of a direct conflict—and such conflicts, I believe, are inevitable—black lawyers should choose the course of action that best supports the social purposes of the lawyering role in question. By "social purposes," I mean those aspects of a given lawyer's role that disinterested social actors would describe as necessary to achieve the social function for which the specific legal task at issue is designed to achieve.[264] This criterion derives from, but ultimately transcends, existing professional norms. It derives from professionalism because of the partial, but nevertheless significant, truth of the consumer protection and opportunity critiques. By placing professional norms at the center of their decisionmaking calculus, black lawyers both acknowledge the legitimate rights of legal consumers and make clear their commitment to honoring legitimate professional norms. Social purpose as a decisionmaking criterion nevertheless transcends the professional sphere by expressly acknowledging that many current norms are the product of a narrow and insular process that protects the bar's own interests far more than those the bar seeks to serve.

Finally, even if black lawyers were scrupulously to follow the method of reasoning I propose, it will still frequently be impossible for them to account for the legitimate demands of each moral sphere in every case. In particular cases, the legitimate moral demands of professionalism, group obligations, and personal commitments will

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262. *Id.* at 27, 136 & n.16, 197-98. I stress the word "plausible" here because, as David Luban points out with respect to Simon's arguments about nullification, it is possible to employ the principle of charity to collapse the distinction between any two moral domains. *See* Luban, *supra* note 114, at 262-63 (arguing that Simon uses the principle of charity to turn law-morality conflicts into law-law conflicts).

263. For a general discussion of conventionalism, see Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 184-91 (1985). As I have argued elsewhere, to say that conventionalism is an appropriate way to try to narrow the range of acceptable interpretations is not to suggest that it can eliminate indeterminacy. *See* Wilkins, *supra* note 181, at 485-90. Needless to say, I make no claim that the reasoning process I am proposing here will result in *determinant* answers to particular problems.

264. *See* Gutmann, *supra* note 70, at 171 (claiming that arguments about racial preferences must be grounded in an understanding of the social purposes of jobs). I discuss and elaborate on Gutmann's important argument in Wilkins, *supra* note 245, at 16-20.

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conflict in ways that no overarching decisionmaking criteria can resolve. As a result, even the best thought-out and executed moral plan is likely to produce what the noted philosopher Bernard Williams refers to as "a moral remainder": the moral residue from the competing moral positions that simply could not be accommodated in the final action.[265] This residue continues to exert moral force, even if we assume that the all-things-considered judgment about what to do is morally correct.[266] Black lawyers must develop methods for accounting for this moral residue in future actions.

A moral life in the law, therefore, involves more than a series of "on or off," "yes or no" moral decisions. It involves learning to live with the compromises and trade-offs that the complex view of morality I am describing will inevitably produce. The core of race-conscious professionalism, therefore, is a black lawyer's commitment to navigate the competing demands of professionalism, racial obligations, and personal integrity in a manner that, in the long run, ensures that each moral sphere receives its moral due.

The next Part returns to the three cases we have been discussing to determine how his commitment would operate in practice.

III. LEARNING TO LIVE IN THE CONTRADICTIONS

Let us return to the three cases with which we began: the black lawyer who represents the Ku Klux Klan, the black district attorney who refused to seek the death penalty, and the Simpson prosecution. The first step in applying the framework I propose is to recharacterize each case in terms of a clash among the lawyer in question's professional, race-related, and personal moral commitments.[267] Thus, Anthony Griffin's decision to represent the Klan is solidly grounded in both a long-standing professional commitment to provide legal representation for even the most repugnant clients and Griffin's strong

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265. *See* Bernard Williams, *Ethical Consistency*, *in* MORAL DILEMMAS 115, 129 (Christopher W. Gowans ed., 1987).

266. *See* JACK & JACK, *supra* note 60, at 42-44 (noting that "even morally proper decisions . . . involve moral costs").

267. This recharacterization inevitably involves a certain amount of speculation, simplification, and alteration. It is speculation in the sense that there is a good deal about the motivations of each of these men that I do not know. Moreover, given the limitations of the present inquiry, I have had to simplify much of what I do know. Finally, for purposes of highlighting particular issues, I have, on occasion, substituted hypothetical motivations and commitments for a given lawyer's real commitments. These last changes are clearly identified. For a more complete discussion of the first and third cases, see generally Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 19, which discusses Anthony Griffin, and Wilkins, *Straightjacketing Professionalism*, *supra* note 19, which discusses Darden and Cochran.

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personal commitment to his colleagues at the ACLU and, more generally, to a robust interpretation of the First Amendment.[268] These professional and personal commitments, however, appear (at least on first blush) to conflict with Griffin's obligation to protect the black community's interest in combating racist oppression, or, at a minimum, not to *assist* those who victimize blacks from escaping prosecution.

Robert Johnson's situation exemplifies a somewhat different configuration of interests. Johnson's race-based obligation to refrain from participating in a form of punishment that, in his view, will inevitably be applied in a racially discriminatory manner appears to conflict with his professional obligation to enforce the law as written. Johnson also appears to be personally opposed to the death penalty.[269]

The now infamous Darden-Cochran exchanges highlight additional alignments. As one of the lead prosecutors, Darden had a strong professional obligation to present all reasonable arguments pointing to Simpson's guilt. Moreover, this role-related obligation coincided with Darden's personal belief that Simpson was guilty and, more generally, with his commitment to vigorous law enforcement.[270] In the eyes of many blacks and some whites, however, Darden's efforts to suppress Fuhrman's prior racist statements—and his prosecution of Simpson generally—are emblematic of the manner in which the criminal justice system fails to respect the rights of African Americans.[271] Many of these same blacks and whites viewed Cochran's infamous call for the jury to "send a message" that police racism and incompetence

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268. For a discussion of a lawyer's professional obligation to unpopular clients, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1980), which mandates that a lawyer shall "[a]ssist the [l]egal [p]rofession in [f]ulfilling [i]ts [d]uty to [m]ake [l]egal [c]ounsel [a]vailable," and *id.* EC 2-27, which urges lawyers not to "decline representation because a client or a cause is unpopular." For a recent defense of this proposition, see Alan Dershowitz, *Good Lawyers, Bad Clients; Defending the Offensive; Judging Who Deserves Representation Is Dangerous*, WASH. POST, Apr. 6, 1997, at C3, *available in* LEXIS, News Library, Wpost File. For an account of Griffin's strong civil libertarian views, see Moran, *supra* note 31.

269. *See* Adam Nossiter, *Balking Prosecutors: A Door Opens to Death Row Challenges*, N.Y. TIMES, Mar. 11, 1995, at A27, *available in* LEXIS, News Library, Nyt File (reporting that those who know Johnson claim that his opposition to the death penalty "also reflected [his] strong personal conviction").

270. *See* CHRISTOPHER A. DARDEN WITH JESS WALTER, IN CONTEMPT 4 (1996) ("He'd done it. He'd killed [Ron Goldman and Nicole Brown Simpson] . . . . I just wanted to talk to him, make sure he knew that he hadn't fooled all of us and that his 'Dream Team' hadn't fooled most Americans.").

271. For a compilation of sources discussing the "Darden Dilemma," see Russell, *supra* note 24, at 779 n.35.

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should not be tolerated as speaking directly to this race-related obligation. Like Darden, Cochran's advocacy tracked his personal beliefs, both about Simpson's guilt (i.e., that Simpson was innocent) and about law enforcement generally (i.e., that the police frequently mistreat, and not infrequently attempt to frame, African American defendants).[272] Although these race-based and personal commitments were consistent with Cochran's duty to provide Simpson a zealous defense, many assert that they led him to exceed the legitimate professional boundaries of such a defense by unethically injecting race into the trial.[273]

The first thing to notice about this recharacterization of these three cases is that it demonstrates that adherents of bleached out professionalism exaggerate the danger of allowing lawyers to incorporate their identity into their professional roles. In each of these cases, one important consequence of integrating identity and role is to *reinforce*, at great personal cost, professional norms. Thus, Anthony Griffin's strong suspicion of state power is rooted in his experience as a black man growing up in the South.[274] This suspicion, in turn, underlies his personal commitment to the ACLU and its strong support of First Amendment rights, which in turn motivates Griffin to uphold one of bleached out professionalism's highest aspirational goals: making legal counsel available to clients with unpopular views.[275] Similarly, Robert Johnson's opposition to the death penalty, rooted in his experience in and commitment to the black community, was the motivating force behind his willingness to risk his career in an effort to prevent the State from pursuing a course of action that threatens the legal profession's central bleached out maxim: the promise of equal justice under law. Finally, both Darden and Cochran directly called on their experiences as African American men to support their professional obligation to zealously advocate their respective clients' positions regarding the admission of Fuhrman's prior racist statements.[276]

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272. *See* JOHNNIE L. COCHRAN, JR. WITH TIM RUTTEN, JOURNEY TO JUSTICE (1996).

273. *See* Russell, *supra* note 24, at 789 n.60 and sources cited therein.

274. *See* Verhovek, *supra* note 22 (quoting Griffin as stating: "'We've come a long way in this country when a black man from the Midwest tells a black man from the South that he trusts the State of Texas. . . . I do not.'").

275. *See supra* note 268 and accompanying text.

276. *See* Russell, *supra* note 24, at 787 ("'"[W]hen you mention that word to this jury, or any African-American, it blinds people . . . . They won't be able to discern what's true and what's not."'" (quoting Kenneth B. Noble, *Issue of Racism Erupts in Simpson Trial*, N.Y. TIMES, Jan. 14, 1995, at A7, *available in* LEXIS, News Library, Nyt File (quoting Christopher Darden))); *id.* at 787 n.58 ("'"It's demeaning to our jury . . . . African-Americans live with offensive words, offensive looks, offensive treatment every day of their lives. And yet they still believe in this country."'" (quoting Noble, *supra* (quoting Johnnie Cochran))).

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As my colleague Alan Dershowitz eloquently argues in a related context:

> I know that I chose to become a criminal defense lawyer at least in part because I am Jewish. I was taught from the earliest age that Jews must always remember that they were persecuted, and that we must stand up for those who now face persecution. "Thou shall not stand idly by the blood of thy neighbor" was more than a slogan. "Repair the world" was an imperative. . . . I always wanted to be a Jewish lawyer, and, though many Jews disapprove of some of my clients, I believe I am a lawyer in the Jewish tradition.[277]

Group-based moral commitments need not undermine what Stephen Pepper calls the lawyer's "amoral professional role."[278] Sometimes they provide the very motivation that makes this sometimes difficult moral stance possible.

That being said, all three of these cases also appear to present a classic conflict among the competing demands of race, individual autonomy, and professional role. In order to determine whether there is such a conflict, however, it is necessary to look more closely at the claims that have been made about the content and scope of the obligations emanating from each of these moral domains.

A. Charity and Conventionalism: Narrowing the Gap

Consider the case of the black lawyer and the Ku Klux Klan. Many media commentators—and even Griffin himself—discussed this case as if Griffin had an ethical *obligation* to represent the Klan.[279] Current bleached out professional norms, however, impose no such requirement. Instead, the rules of professional responsibility expressly grant lawyers the permission to turn down cases for virtually any reason, including that the lawyer has a sincere moral disagreement with the client or the client's cause.[280] As William Kunstler, who for more than four decades was perhaps America's foremost advocate for unpopular clients, once stated when explaining why he would not

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277. Dershowitz, *supra* note 254, at 39.

278. Pepper, *supra* note 15, at 613-14.

279. *See* Verhovek, *supra* note 22 (quoting Griffin as saying: "'In our role as lawyers . . . [w]e recognize rules and principles of law'" that require lawyers not to "'back[ ] off because someone is unpopular or hated.'").

280. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1980) ("A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client . . . .").

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represent the Klan: "Everyone has a right to a lawyer, that's true. But they don't have a right to *me*."[281]

Griffin's case is therefore distinguishable from others in which black lawyers have represented the Klan or other white supremacists. For example, in a recent case in Boston, Oliver Mitchell, an African American trial attorney, was *assigned* to represent Richard Czubinski, a self-described white supremacist.[282] Similarly, Patrick Hardy, a black lawyer working for a private firm that by contract is obligated to provide public defender services for a small city in Washington State, was also essentially *assigned* to defend a white supremacist accused of scuffling with a cameraman at a Ku Klux Klan rally.[283] The legal profession has long recognized an exception to an attorney's right to decline representation in cases where a court appoints a lawyer to represent an indigent defendant.[284] Although a lawyer may still seek permission to decline an assignment if the client's views are "so repugnant to the lawyer as to be likely to impair . . . the lawyer's ability to represent the client,"[285] there nevertheless remains a strong presumption that lawyers ought to accept the cases they are assigned absent extreme extenuating circumstances.[286] Griffin, therefore, had substantially more *professional* discretion[287] than either Mitchell or Hardy to decline to represent the Klan.[288]

To note that the professional sphere's demands on Griffin are not as capacious as some have portrayed, however, does not mean that

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281. *Sonya Live* (CNN television broadcast, Nov. 5, 1993).

282. *See* Ralph J. Ranalli, *Black Man's Burden*, BOSTON MAG., July 1997, at 28, 28 ("Only the random machinations of a computer could have matched Czubinski and Mitchell—in this case, the computer at Boston's federal courthouse that pairs private defense attorneys with indigent clients.").

283. *See Black Lawyer to Represent Skinhead*, SEATTLE TIMES, Sept. 4, 1996, at B2, *available in* 1996 WL 36680348.

284. *See* Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 279-81 (1993) (noting that court appointment is the only exception to the lawyer's traditional freedom to turn down a client for any reason (citing, among other sources, N.Y. CIV. PRAC. L. & R. 1102(a) (McKinney 1976) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29)).

285. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1992).

286. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 ("When a lawyer is appointed by a court . . . , [the lawyer] should not seek to be excused from undertaking the representation except for compelling reasons.").

287. As I argue below, Griffin's *personal* obligations to his colleagues at the ACLU may have left him very little discretion to decline this case.

288. I do not mean to imply that an appointed lawyer should have no discretion to refuse to represent a client because of issues relating to a lawyer's non-professional identity. For an excellent argument that lawyers should have this discretion, see Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997).

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they are unimportant. The rules of professional responsibility urge lawyers not to turn away unpopular clients or causes.[289] Traditionally, the profession celebrates lawyers who represent unpopular clients as providing a vital service to democracy and freedom.[290] Some would go even further. For example, in a recent article, Alan Dershowitz argues that lawyers should almost never decline cases because of their opposition to the client's views, particularly in criminal cases and cases involving First Amendment rights.[291] Noting that doctors and dentists are not free to turn away patients whose views they despise, Dershowitz asks "why lawyers should have greater freedom to discriminate than do other professionals."[292]

The answer to Dershowitz's question lies in the rejection of bleached out professionalism.[293] That theory suggests that lawyers surrender their moral autonomy simply by becoming lawyers.[294] Forfeiting this independence, however, requires too much of lawyers. Given our society's commitment to both individual autonomy and moral pluralism, it would be wrong for the state (or the profession) to require an individual to commit a moral wrong for the sake of the greater good.[295] This is one principal reason we allow conscientious objection from military service.

Moreover, like soldiers fighting for their country—but unlike doctors or dentists—lawyers must actively *advocate* for their clients. Griffin's case underscores this distinction. As the Klan's lawyer, Griffin was obligated to present arguments on the Klan's behalf—arguments that both Griffin and his client acknowledged were likely to be perceived as being more credible precisely because Griffin is black.[296] The closer doctors and dentists get to having to advocate for someone whose views they despise, the less, I suspect, either their professions or

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289. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-27 (urging lawyers not to decline representation because "a client or a cause is unpopular").

290. *See Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) (calling the representation of unpopular clients "[o]ne of the highest services the lawyer can render to society").

291. *See* Dershowitz, *supra* note 268.

292. *Id.*

293. Ironically, as I noted previously, Dershowitz himself does not consider himself a "bleached out" lawyer. *See* Dershowitz, *supra* note 254, at 38 (proclaiming that "my Jewish heritage greatly influences my life" and that "I teach and practice law Jewishly").

294. *See* Pepper, *supra* note 15, at 618-19 (arguing that once someone decides to become a lawyer, there is only a limited range for her to exercise her moral autonomy).

295. *See* Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 19, at 1039 (discussing the moral responsibility of a lawyer who decides to take or not to take a given case).

296. *See id.* at 1042 ("Griffin's presence at counsel table improves the Klan's chances of successfully resisting the State's disclosure order.").

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the public in general believe that they have an unqualified obligation to ignore their sincerely held moral beliefs.[297]

Of course, in Griffin's case, all of these arguments were largely beside the point because Griffin *wanted* to represent the Klan. As a loyal member of the ACLU, Griffin was committed to defending First Amendment principles regardless of his personal opposition to his client's views. This strongly held personal conviction is crucial to any evaluation of Griffin's actions.[298] Nevertheless, it is important to see that Griffin was not *compelled* to represent the Klan by the profession's norms. Nor should he have been, given our respect for the very moral autonomy that, in the last analysis, makes me support his decision to represent the Klan in this case. Understanding the limitations of the professional sphere should help lawyers to strike this balance.

A related case underscores the limited nature of the demands of group-based moral commitments. In July 1991, Joseph Stropnicky contacted Judith Nathanson, a well-known Massachusetts divorce lawyer, to see whether she would review a draft settlement agreement that Stropnicky and his wife had worked out with a mediator in connection with their upcoming divorce.[299] The mediator had referred Stropnicky to Nathanson because the latter was well known for winning large settlements on behalf of divorcing women who, by putting their husbands through school and taking care of childcare and household responsibilities, had substantially contributed to their husbands' careers. Stropnicky was in a similar situation. During their eighteen-year marriage, Stropnicky put his wife through medical school and delayed his own career plans for seven years, acting as the couple's primary childcare provider and homemaker.[300] Despite these similarities between Stropnicky's situation and Nathanson's female clients, Nathanson categorically refused to represent Stropnicky on the ground that she did not represent men.[301] Stropnicky subsequently filed a complaint against Nathanson's "women only" policy with the Massachusetts Commission Against Discrimination.[302]

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297. For example, even doctors who are qualified to do so are not ethically required to perform abortions. Sylvia A. Law, *Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. REV. L. & SOC. CHANGE 279, 303-06 (1994).

298. *See supra* note 268 and accompanying text.

299. This summary of the case is taken from the findings of fact and conclusions of law entered by the Massachusetts Commission Against Discrimination. *See* Stropnicky v. Nathanson, No. 91-BPA-0061 (Mass. Comm'n Against Discrim.) (Feb. 25, 1997) (Charles E. Walker, Hearing Commissioner).

300. *Id.* at 2-3.

301. *Id.* at 3.

302. *Id.* at 3-4.

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In her response to Stropnicky's complaint, Nathanson sought to justify her decision on grounds that sound in the obligation thesis. Nathanson, a self-proclaimed feminist lawyer, argued that she wanted to devote her expertise to eliminating gender bias against women in the court system.[303] Representing men in divorce cases, she asserted, threatened the interests of women by de-emphasizing women's traditional contributions to the family unit.[304]

Assuming that gender-based obligations can be analogized to race-based ones,[305] Nathanson's desire to promote women's rights by protecting the interests of women in divorce cases is, standing alone, fully justified. As numerous studies have documented, gender discrimination is still pervasive in America's courts.[306] Moreover, women lawyers have played and continue to play a crucial role in working to uncover and ameliorate these inequities.[307] Finally, Nathanson has a legitimate concern that when she represents men in divorce cases, she inevitably lends her gender identity to their cause. This reality, as I have argued, sometimes gives black lawyers good grounds for declining representation in particular cases.

Nevertheless, it is doubtful that the obligations that women attorneys owe to other women to fight against these injustices prohibit a woman from representing a man in Stropnicky's circumstances. Over the years, advocates for women's rights have won important victories by bringing cases on behalf of men ensnared in legal traps that traditionally disadvantage women. In the 1970s, for example, Justice Ginsberg, a prominent advocate for women's rights, made representing

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303. *Id.* at 4.

304. *Id.* at 4-5.

305. Once again, it is important not to assume that this will inevitably be the case. However, given the fact that women constitute an even larger and more diverse community than African Americans, it seems unlikely that the demands of solidarity will be *greater* in the area of gender than they are in the area of race.

306. *See, e.g.*, Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 IND. L.J. 941 (1991) (discussing the similar conclusions of reports from the Indiana Bar and the American Bar Association that there remained "persistent gender discrimination throughout the legal profession"); *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1657, 1732-34 (1996) (presenting focus group conclusions that women are under-promoted in private firms and the government); *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994) (discussing the perception among female lawyers that women are not treated as equals in promotion or appointment).

307. *See, e.g.*, Gellis, *supra* note 306; Deborah Holmes, *Structural Causes of Dissatisfaction Among Large Firm Attorneys: Feminist Perspective*, 12 WOMEN'S RTS. L. REP. 9 (1990); Carrie Menkel-Meadow, *Exploring a Research Agenda of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (1989); Deborah Rhode, *Perspective on Professional Women*, 40 STAN. L. REV. 1163 (1988).

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men a mainstay of her legal strategy for overcoming sex discrimination.[308] Although criticized by some feminists,[309] this strategy proved "highly appealing to male judges, who had to be educated to see the unfairness of sex distinctions that had long been accepted."[310]

The fact that some may differ about the wisdom of a particular strategy for advancing women's rights does not mean that it is ruled out of bounds by the obligation thesis. Given the complexity of the issues confronting women, blacks, and other oppressed groups, it is imperative that advocates for these communities recognize that there are many strategies for advancing (in this case) women's rights. And it is the *right*—in this case the right to a fair share of the jointly acquired career—and not simple solidarity that defines the acceptable bounds of the obligation thesis.

The emphasis on rights helps to explain why Nathanson cannot fall back on the personal sphere to justify her decision. In discussing Griffin's case, I argued that respect for a lawyer's personal integrity requires that he not be forced to advocate *causes* that he finds morally reprehensible.[311] It is quite another matter, however, to assert that an attorney may decline to represent individuals on the basis of their *status*.[312] Such conduct violates the overarching moral injunction against treating people differently on the basis of morally irrelevant characteristics such as gender or skin color. As such, it fails the limiting test that applies to all three "secondary" moral universes: it contravenes the limits of common morality.

The Griffin and Nathanson cases demonstrate that what might look like conflicts among the spheres are, in reality, produced by erroneous claims about the scope of one or another of these moral domains. The Johnson case highlights how failing to recognize the

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308. Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 60. Discussing *Weinberger v. Wiesenfeld*, a landmark Supreme Court decision in which Ginsberg represented a young widower denied social security benefits under circumstances in which a young widow would have been entitled to compensation, Ginsberg recently stated that her strategy in that case "'epitomized for [her] all that [women] were doing in the 70's.'" *Id.* (quoting Ginsberg).

309. *See id.* ("[Justice] Ginsberg was attacked by feminists in the 1980's as 'phallocentric' and 'assimilationist'. . . .").

310. *Id.*

311. *See supra* notes 294-297 and accompanying text.

312. *See* Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 19, at 1039 n.51 (arguing that a rule permitting a lawyer to decline representation if she has a sincere moral disagreement with the client or the client's cause does not allow an attorney to refuse to represent all black clients on the ground that she "morally" disapproves of their right to representation).

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diversity among lawyering roles can also contribute to similar mischaracterizations.

Governor Pataki and many critics in the media claimed that Johnson put himself "above the law" when he refused to drop his opposition to the death penalty after the legislature enacted New York's first capital statute.[313] This characterization, however, fails to acknowledge sufficiently those aspects of Johnson's role as district attorney that provide space for at least some of Johnson's actions. For example, in addition to being an "advocate," Johnson is also an administrator. In that capacity, he is responsible for allocating the scarce resources of the prosecutor's office in the most efficient manner possible. Johnson argued that one reason he did not intend to seek the death penalty is that death cases were not an efficient use of the office's resources compared with the alternative of seeking life without parole.[314] Other prosecutors concur in this assessment.[315]

In recognition of their administrative duties, prosecutors have traditionally been granted wide discretion over charging decisions.[316] In keeping with this tradition, New York's statute expressly gives the prosecutor discretion to decline to seek the death penalty even in cases where it applies.[317] Johnson's decision to "exercise [his] discretion to aggressively pursue life without parole in every appropriate case" but "not to utilize the death penalty provisions of the statute," is therefore simply a species of the kind of decision prosecutors make every day.[318]

Moreover, in addition to being an administrator, Johnson is also an elected official. In Part I, I argued that bleached out professionalism failed to capture the extent to which voters have a legitimate right to elect non-bleached out officials to represent them. Johnson's expe-

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313. *See supra* note 90.

314. *See For Governor and Prosecutor, a Running Argument over the Law*, N.Y. TIMES, Mar. 21, 1996, at B7, *available in* LEXIS, News Library, Curnws File (stating that the money spent on death penalty appeals as opposed to seeking life without parole "'could be better spent on valuable and broadly based crime-fighting and crime-prevention programs . . . .'" (quoting Robert Johnson)).

315. *See* Daniel Wise, *D.A.'s on the Death Penalty*, N.Y. L.J., Mar. 3, 1995, at 1 (reporting that the District Attorney of Manhattan opposes the death penalty, inter alia, "'because of the cost, time spent and diversion of resources'" from other crimes (quoting Robert M. Morganthau)).

316. *See supra* note 165.

317. *See* Rachel L. Swarns, *Prosecutor Resists Pataki Pressure on Death Penalty*, N.Y. TIMES, Mar. 21, 1996, at B1, *available in* LEXIS, News Library, Curnws File (noting that under state law, prosecutors have 120 days to decide whether to seek the death penalty).

318. *Id.*; *accord* Hoffman, *supra* note 165 (reporting that Monroe Freedman contends that Johnson's refusal to seek the death penalty was a legitimate exercise of his discretion to allocate his office's limited resources efficiently).

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rience is a case in point. Johnson's district is more than two-thirds minority, including a substantial number of African Americans.[319] Contrary to common perceptions, blacks as a group tend to favor more, not less, law enforcement in their neighborhoods.[320] This support for increased law enforcement, however, does not carry over to the death penalty, which many blacks believe will inevitably be administered in a manner that discriminates against blacks.[321] During the 1995 campaign, Johnson expressly declared that he would continue his policy of being tough on crime, including cracking down on drug sales near schools and reducing the opportunity for defendants to plea bargain to lesser charges.[322] He also made it crystal clear that he did not intend to seek the death penalty.[323] Despite extensive criticism from Pataki, Mayor Giuliani, the media, and even the Ethics Chair of the Association of the Bar of the City of New York, Johnson was overwhelmingly reelected by his constituents.[324] Johnson's refusal to seek the death penalty must be viewed against the backdrop of this electoral mandate.

Although these role-related considerations help us to place Johnson's decision in its proper context, they do not justify his blanket refusal to seek the death penalty in all cases. Although the statute expressly grants Johnson discretion, a fair reading requires a district attorney to exercise that discretion on a case-by-case basis consistent with the legislature's determination that the death penalty is at least presumptively cost justified.[325] Similarly, although Johnson is responsible to his constituents, he does not have the authority to exempt his jurisdiction from laws enacted by a higher sovereign authority. Although, as William Simon would surely note, this argument rests on positivist assumptions about the jurisdictional superiority of the state

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319. *See* Nossiter, *supra* note 269.

320. *See* BUREAU OF JUSTICE STATISTICS: SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, at 174-75, 178 (Kathleen Maguire & Ann L. Pastore eds., 1994) (noting that in 1994, polls found that 82% of blacks surveyed felt that courts in their area did not deal harshly enough with criminals, and 68% of blacks approved of building more prisons so that longer sentences could be given to criminals).

321. *See* Nossiter, *supra* note 269 (noting that "some national surveys have shown blacks to be more hostile to the death penalty than the population as a whole is").

322. *The Bronx D.A. Who Says No Way*, NEWSDAY (N.Y.), Mar. 16, 1995, at A33, *available in* 1995 WL 5100579.

323. *See id.* ("[T]he death penalty is not the panacea that some people think it is.").

324. *See* Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 524, 536 & n.98 (1996) (citing Ian Fisher, *Election 1995: The Overview*, N.Y. TIMES, Nov. 8, 1995, at B1).

325. *See* Hoffman, *supra* note 90 (quoting Stephen Gillers as arguing that the statute requires the prosecutor to exercise his discretion on a case-by-case basis and not to substitute his judgment for "'the will of the people as expressed through the legislature'").

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legislature over the people of the Bronx, Johnson has a legitimate role obligation to embrace this formalism when interpreting the scope of his legal authority.[326]

Johnson, therefore, had a professional obligation to seek the death penalty in cases where, in his professional judgment, the punishment was warranted under the statute. Assuming that the death penalty is not per se immoral,[327] Johnson was morally bound by this commitment. It is this otherwise binding professional role obligation that conflicts with Johnson's race-based commitment not to participate in imposing a penalty that he believes is inherently racist and which he finds personally reprehensible. This brings us to the issue of social purpose.

B. Mediating Social Conflict Through Social Purpose

When faced with a direct conflict between or among the legitimate demands of two or more moral spheres, black lawyers must learn to recognize and give regard to the legitimate social purposes underlying the particular lawyering role in question. Return, once again, to Nathanson's objection to representing men in divorce cases. In the last subpart, I argued that Nathanson's contention that either group-based or personal moral criteria compelled the decision is unpersuasive. But even if we were to give credence to these arguments, for example, by assuming that it is morally permissible to discriminate against individuals on the basis of their status in certain kinds of personal interactions, it would still not be permissible for a *lawyer* to do so in the course of her professional role. Regardless of whether current professional norms allow her to do so,[328] status-based discrimination undermines the legitimate social purposes underlying the rules re-

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326. *See supra* note 202 and accompanying text.

327. There is a wide range of opinion about the morality of the death penalty. Although I am personally opposed to the death penalty, I am inclined to agree with those who believe that capital punishment, like abortion, is a topic about which reasonable people can differ. Of course, if the death penalty is per se immoral, then no one should participate in capital cases.

328. A growing number of jurisdictions have passed ethical rules prohibiting lawyers from engaging in various forms of status-based discrimination. *See* Begg, *supra* note 284, at 312 (reporting that seven jurisdictions have passed some form of anti-bias provisions relating to lawyer conduct). Some of these provisions, however, expressly exempt the decision whether to enter into an attorney-client relationship. *Id.* at 314-15. The Nathanson case demonstrates, however, that lawyers may still find themselves subject to suit under state or federal public accommodations statutes even in jurisdictions where this conduct is not covered. *See* Stropnicky v. Nathanson, No. 91-BPA-0061, slip op. at 6-8 (Mass. Comm'n Against Discrim. Feb. 25, 1997) (finding that a lawyer's office is a "public accommodation" under the terms of the relevant statute).

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garding client selection. While it is true that the attorney-client relationship is inherently personal, this should not be taken as a license for individuals to indulge their personal taste for discrimination. Lawyers have been granted a monopoly by the state to perform an essential service. Whether they technically constitute a "public accommodation," the profession's commitment to "equal access under law" is undermined if individual lawyers are allowed systematically to refuse to represent individuals on the basis of considerations that have nothing to do with either their moral worth as human beings or the legitimate interests of attorneys.

Nor can rules permitting wholesale status-based discrimination be justified on the ground that they are necessary to protect clients. As both the Nathanson and Griffin cases underscore, sometimes clients will rationally prefer to work with lawyers who are hostile to the client for reasons extending beyond the attorney-client relationship.[329] Clients who obtain lawyers who would rather not serve them are protected by malpractice and other related doctrines against incompetence or deceit on the part of their reluctant champions.

Needless to say, enforcing this professional command would be difficult to say the least.[330] Enforcement, however, has never been thought to define the entire ambit of ethics or morality.[331] My point simply is that whether or not they will be sanctioned, lawyers faced with a dilemma involving a group-based or personal "obligation"[332] to engage in status-based discrimination should refrain from doing so in their professional roles as lawyers.

The question would be much closer, however, if the issue were employment rather than representation. What if Nathanson wanted to practice law only with other women? Some of the new statutes and professional rules would also appear to prohibit all-female (or all-

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329. *See, e.g.*, Verhovek, *supra* note 22 (quoting Michael Lowe as stating that he was delighted to have a black lawyer who opposed the Klan because, in his words, "'he has to do a good job for me'" or else "'[e]verybody will know I got sold down the river by the A.C.L.U.'").

330. *See* Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 15 (1993) ("[A] lawyer who wishes to avoid sanctions . . . may do so by hiding her real reasons for refusing to represent the client.").

331. *See id.* at 13-15 (acknowledging ethical requirements notwithstanding the ineffectiveness of enforcement through malpractice proceedings and the "obvious" conclusion "that enforcement of the rule . . . could be extremely difficult, if not impossible").

332. The scare quotes are meant to remind the reader that I do not believe that either the group-based or the personal sphere supports such an "obligation."

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black) firms.[333] Moreover, there can be little doubt that if Cravath, Swaine & Moore were to reinstitute its "male-only" hiring practice there would be universal outrage from every corner of the bar.[334] Nevertheless, it is far less clear that a "women-only" law firm violates the legitimate social purposes of law firm hiring. In today's climate, male-only firms both deny women substantial opportunity and reinforce stereotypes. A "women-only" firm might not have either of these two effects. There is a fair degree of evidence that "women-only" working environments, like women's colleges, foster an atmosphere that is uniquely suited for women's professional development. To the extent that this is true, these institutions may help to undermine, rather than to reinforce, gender stereotypes.

An analogy might be drawn to private health clubs. In a recent decision, the Massachusetts Superior Court ruled that a chain of "women-only" health clubs called "Healthworks" can no longer exclude men.[335] The hearing officer based his decision on a straightforward application of the principles that prohibit "men-only" private clubs.[336] Putting aside for the moment whether this is a proper reading of the public accommodations laws, the decision fails to acknowledge the extent to which "women-only" health clubs fulfill a fundamentally different social purpose than all-male social and athletic facilities. "Women-only" workout clubs are unlikely to stigmatize men as inferior in the manner that all-male clubs stigmatized women. Moreover, the central problem with all-male clubs is the extent to which they denied women access to places where important decisions are made.[337] Given that the vast majority of economic, political, and social power continues to

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333. *See* Quick, *supra* note 330, at 7-8 (explaining that many of the new statutes and bar rules expressly prohibit discrimination in employment); *see also* Begg, *supra* note 284, at 312-14 (specifically discussing rules enacted in New York, Colorado, Rhode Island, New Jersey, and Minnesota).

334. *See, e.g.*, Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 187-88 (1994) (noting the duty of all employers, including law firms, to treat employees of both sexes equally (citing 29 C.F.R. § 1604.11(f) (1993); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977))).

335. *See* Foster v. Back Bay Spas, Inc., No. 96-7060, 1997 WL 634354 (Mass. Super. Ct. Oct. 1, 1997).

336. *Id.*

337. *See, e.g.*, Michael M. Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 321 (1983) (adopting the views of a congresswoman's aid: "I doubt that the best or most able of women can ever get to the inner circle . . . ."); Kimberly S. McGovern, Comment, Board of Directors of Rotary International v. Rotary Club of Duarte: *Prying Open the Doors of the All-Male Club*, 11 HARV. WOMEN'S L.J. 117, 119 (1988) ("The sex-based exclusion means that women are categorically excluded from the loci of power . . . and are therefore categorically deprived of equal economic opportunity."). For further discussion, see Note, *State*

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be concentrated in the hands of men, "women-only" facilities are unlikely to produce the same exclusionary effects. Thus, to the extent that "women-only" clubs help to protect the special privacy interests of women, the absence of these other invidious effects substantially diminishes the case for denying women these important benefits.[338]

Once again, even if one disagrees about the resolution of this particular issue—whether women should be allowed a certain amount of latitude to create "women-only" workplaces—I want to insist that one should resolve the question by carefully examining the social purposes of the particular lawyering role—in this case employment—as opposed to reaching some global determination about whether "discrimination" is or is not appropriate for lawyers.[339] The example of employment is simply meant to suggest that sometimes that analysis leads to the conclusion that color-consciousness, and not color-blindness, offers our best hope for professionalism.

Consider, for example, the prosecution's strategy in the Simpson case. Both Garcetti and Darden stated repeatedly that race was not an issue in the case.[340] To the extent that these statements were intended to convey the impression that race was *irrelevant*, they were clearly wrong. Long before Fuhrman's racism or the racial composition of the jury surfaced as issues in the case, the simple fact that a black man was accused of murdering his white (blond, no less) former wife and her handsome white friend ensured that race was likely to play an important role in how people viewed the case. Nevertheless, the prosecution's statements captured an important aspirational norm fundamental to the social purpose of our justice system: that race *should not* affect the determination of the accused's guilt or inno-

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Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations, 104 HARV. L. REV. 1835 (1991) and sources cited therein.

338. Massachusetts recently amended its public accommodation statute to exempt single-sex health clubs. Patricia Wen, *Single-Sex Health Clubs Get Protection*, BOSTON GLOBE, Feb. 7, 1998, at B1. The bill passed because of a consensus among legislators that "many women would not exercise without all-female gyms." *Id.* Some women's groups are threatening to challenge the new law in court. *Id.* Ironically, the fact that the new law is facially gender neutral may weaken their claim. In my view, gender neutrality should strengthen a challenge to the new law, because the benefits to women of "women-only" clubs may be outweighed by the harm of reconstituting all-male clubs.

339. Indeed, it might not even be the case that all race-conscious employment practices should be treated equally. Whatever one thinks about the ethical propriety of a "women-only" policy for attorneys, one might nevertheless conclude that excluding men from *all* jobs within a firm (i.e., secretaries, paralegals, messengers) poses too great a threat to the social purposes underlying the lawyer's role as a general (and not just legal) employer. The analogy here would be an all-female college that refused to hire male custodians or faculty members.

340. *See* Russell, *supra* note 24, at 786.

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cence. To honor this norm, however, prosecutors are sometimes justified in engaging in race-conscious lawyering strategies.

Viewed from this perspective, Garcetti's decision to prosecute Simpson in Los Angeles County rather than in Santa Monica County and his addition of Darden to the prosecution team support, rather than undermine, the legitimate aspirations of the criminal justice system.[341] Given the composition of the respective jury pools, a Los Angeles jury would likely include several blacks. A Santa Monica jury would not.[342] In light of the racially charged atmosphere in L.A. at the time of the Simpson trial, and the long history of the demonization of black male sexuality, trying the case before a jury that included at least some blacks arguably made it more likely that the legal system would honor—and just as important, be seen as honoring—its commitment that race should not affect the determination of Simpson's guilt. Similarly, Garcetti's race-conscious decision to add a black prosecutor to the team—particularly one with a history of uncovering and prosecuting police misconduct—plausibly increased the chance that Simpson's allegations of official bias and corruption would receive—and, once again, be perceived as receiving—a fair hearing.

The argument that these race-conscious lawyering strategies support, rather than undermine, the legitimate social purposes of the criminal justice system presumes that those black participants included in the proceeding will honor their legitimate role obligations and will not simply become racial patriots. This does not require that they subscribe to bleached out professionalism. Thus, black jurors were entitled to bring their experience and understanding of racism and official corruption into the jury room. At the end of the day, however, they were obligated to acquit or convict Simpson on the basis of the evidence and arguments presented during the trial.[343] Even nullification should be based on the presence of injustice (either in the content or the application of the law) *in the particular case.* Thus, black jurors must reject Paul Butler's call for the wholesale nullifica-

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341. For a more complete defense of this position, see Wilkins, *Straightjacketing Professionalism, supra* note 19, at 808-09. As I indicate there, I make no claim that the interpretation I propose for Garcetti's decisions accurately captures his real motivation for reaching these judgments. *See id.* at 808 n.61.

342. The actual racial compositions of the juries in Simpson's criminal and civil cases bear this out. *See* Peter S. Canellos, *Two Trials, Two Verdicts, Many Theories; Debates on Simpson Still Focus on Race,* BOSTON GLOBE, Feb. 6, 1997, at A1, *available in* 1997 WL 6240874 (observing that in the criminal case, 9 of 12 jurors were black, while in the civil case, 9 of 12 jurors were white).

343. I believe that the black jurors fulfilled this obligation. *See* Wilkins, *Straightjacketing Professionalism, supra* note 19, at 810 n.69 (noting that the jury acquitted Simpson based upon reasonable doubt and not racial motivations).

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tion of all convictions for non-violent offenders regardless of whether there is any credible evidence that a particular defendant's trial was tainted by racism or that the laws against non-violent crime are per se illegitimate.[344]

Similar arguments constrained Darden and Cochran. As I have already indicated, Darden's argument in favor of suppressing Fuhrman's racist statements was expressly color-conscious. Given that he was one of the lead prosecutors on the case, however, Darden was obligated to deploy this color-conscious strategy for the purpose of keeping Fuhrman's statements away from the jury. As a black man, and a strong opponent of racism within the police department, Darden may well have believed that exposing Fuhrman's racism would advance the black community's interests by highlighting the problems with the police that African Americans encounter on a daily basis. Nevertheless, as a prosecutor, Darden had an ethical obligation to make all reasonable arguments in favor of Simpson's guilt. Darden had good grounds under the applicable rules of evidence for seeking to exclude Fuhrman's statements during his initial appearance on the witness stand.[345] To honor the legitimate social purpose that the strength of the State's case should not be affected by the race of the prosecutor, Darden was obligated to present this argument.

One can apply the same analysis to Cochran's "send a message" statement during his closing argument. Once again, Cochran's argument was race-conscious to the extent that it directed the jury's attention to the defense's claim that police racism infected the investigatory process. However, Cochran's argument may not have exceeded the bounds of legitimate advocacy in a criminal case.[346] "Send a message" arguments are a standard part of the trope of both prosecutors and defense lawyers in criminal cases. Although controversial, this rhetorical device arguably is not a call for nullification. Unlike Butler's proposal, Cochran's argument was based on the alleged existence of racism and corruption in the Simpson prosecution itself. Nor did Cochran limit his appeal to black jurors; instead, he emphasized that all Americans have a stake in ensuring that police racism does not

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344. *See* Butler, *supra* note 83, at 715.

345. *See* Wilkins, *Straightjacketing Professionalism*, *supra* note 19, at 811-12 & n.74 (citing CAL. R. EVID. 1101; FED. R. EVID. 404(a)). As I also note there, the situation was materially different after Darden was presented with conclusive evidence that Fuhrman lied under oath about using racial epithets. In that circumstance, the prosecutor's ethical obligation to "seek justice," and not just to seek convictions, arguably gave Darden the discretion to refuse to oppose the introduction of evidence impeaching the credibility of such an important witness. *Id.* at 813 n.76.

346. *See id.* at 815-18.

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taint the trial process. Regardless of whether one finds these arguments convincing, as Simpson's defense lawyer, Cochran was ethically obligated to present all reasonable arguments in favor of his client.

The same analysis underscores why black criminal defense lawyers should reject Alfieri's proposal that arguments such as those used by lawyers in the Reginald Denny beating case should be prohibited on the ground that they harm the black community.[347] In essence, these lawyers argued that their clients had been swept away by the violence surrounding them and, therefore committed actions that they would not otherwise have committed.[348] This may in fact have been true. Those caught in violent situations, where the normal rules of civil society appear to be suspended, may be more likely to commit violent acts. Given that the degree of the defendants' culpability may also turn on their mental state at the time the actions were committed, the argument that they were swept up in mob violence may also be legally relevant to their guilt or innocence of one or more of the particular crimes with which they were charged. Alfieri's proposal, therefore, asks lawyers to forgo raising factually plausible and legally relevant arguments on behalf of their clients on the ground that the social message sent by these arguments may harm the wider black community.

The social purposes underlying the criminal defense lawyer's role prohibit such trade-offs. These purposes legitimately command defense lawyers to place their client's interests above those of the broader community—even a community of which the client is a member. Although the risk of creating generalized community-based harms may be an appropriate reason for some community advocates to forgo potentially beneficial arguments, criminal defense lawyers cannot endorse this philosophy.[349]

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347. *See* Alfieri, *Defending Racial Violence*, *supra* note 65, at 1301-02.

348. *See id.*

349. For example, one can imagine a black lawyer representing a class of black plaintiffs in a school desegregation case refusing to argue that desegregation was necessary because black neighborhoods are so full of crime and violence that it is impossible for black children to learn. Although this argument might conceivably make a jury (particularly a white jury) sympathetic to the plaintiffs' claim, it might also reinforce negative stereotypes about criminality in the black community. Because the class action lawyer is representing the entire black community, she arguably has an obligation to at least consider how her advocacy strategy is likely to affect the interests of the entire group—including those who will not get the benefit of attending white schools. Needless to say, the claim that the lawyer would be justified in not raising the argument is far from clear. My point simply is that the relevant social purposes underlying class action advocacy in an institutional reform case are different than those underlying the role of the criminal defense lawyer.

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The social purposes underlying criminal defense do not license any and all conduct that might advance the client's cause. Arguments designed to appeal to the racial prejudice of black jurors, for example by suggesting that beating a white man is morally acceptable because of the existence of widespread racism among whites, undermine, rather than support, the legitimate social purposes of criminal defense advocacy. Contrary to the implicit assumptions of bleached out professionalism, this is true regardless of whether a lawyer can create an argument that this kind of advocacy is technically permissible or that he believes that raising the argument is likely to be persuasive with jurors. Although strong advocates of bleached out professionalism insist that lawyers must exploit every conceivable legal loophole, including the scarcity of enforcement resources, to achieve their client's objectives,[350] the most plausible interpretation of the social purposes underlying criminal defense advocacy does not support this conclusion. Informing clients about the shortage of enforcement resources, or in this case raising arguments designed solely to appeal to the racial prejudice of jurors, do nothing to further the defendant's underlying right to put the State to its proof. Their sole purpose is to subvert the legal framework for the defendant's private ends. Regardless of whether one can justify such conduct under the current minimal—not to mention underenforced—restrictions on zealous advocacy, arguments of this kind are fundamentally contrary to the social purposes of lawyering.

The arguments in the Denny case, like Cochran's "send a message" closing argument, are not of this type. As a result, the defendants' lawyers in the Denny case, like Cochran, had an obligation to raise these legally and factually valid arguments on their clients' behalf.

Even in circumstances where a black lawyer feels compelled to violate an express professional command, considerations of social purposes dictate that she do so in a manner that respects the moral force of existing norms. One can see the value of this requirement by contrasting Robert Johnson's actions in death penalty cases with those of Robert Morganthau, the respected District Attorney for the Borough of Manhattan. Johnson publicly announced his intention not to seek the death penalty and carefully explained his reasons for not doing so. By all accounts, Morganthau shares Johnson's view that the death pen-

350. *See, e.g.*, Pepper, *supra* note 15, at 626 (suggesting that lawyers must inform their clients about the "legal realism" view of the law including information about enforcement practices).

alty is administratively inefficient and morally reprehensible.[351] Unlike Johnson, however, Morganthau has consistently taken the position that "he would enforce the will of the people but privately did as little as possible to actually prepare a death-penalty case."[352]

Although Morganthau has largely escaped criticism by covertly submerging his opposition to the death penalty into case-by-case decisionmaking, Johnson, not Morganthau, has demonstrated the appropriate respect for the social purposes of his role as prosecutor.[353] As David Luban argues, lawyers who conscientiously object to unjust laws can play an important role in educating the public about the pernicious effects of legal rules.[354] Given their express authority to interpret legal rules, prosecutors are in a particularly strong position to accomplish this objective. To do so, however, prosecutors must make their objections public and open to review and criticism. By so doing, they both foster public debate and reaffirm respect for the law. The fact that this form of conscientious objection might not be effective—as it was not in Johnson's case—is simply the predictable price of life in a morally complex world. This brings us to the issue of the moral remainder.

C. An Ethical Life in the Law

Johnson's case demonstrates that black lawyers will frequently find that it is not possible to accommodate all of the legitimate moral demands of race, personal responsibility, and professional role at any given time. For most black lawyers, the prospects for giving satisfactory weight to the legitimate concerns of the black community in every case where these interests are implicated are even less sanguine than they were for Johnson, Griffin, Darden, and Cochran.

Most black lawyers continue to practice in relatively low paying and low status echelons of the bar, where basic economic survival is likely to overshadow obligations to the black community.[355] Even those blacks who have gained entry to the elite ranks of corporate practice continue to be marginalized along virtually every dimen-

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351. *See* James Traub, *The D.A.'s Dilemma*, NEW YORKER, July 28, 1997, at 26, 26.

352. *Id.*

353. *See* Luban, *supra* note 114, at 259 ("[L]awyers often should be among the first to violate or nullify [the law], or to counsel others that it is acceptable to violate or nullify it.").

354. *Id.*

355. *See* Wilkins & Gulati, *supra* note 20, at 613-14 (noting that this country's most prestigious law firms remain as segregated today as they were at the time of the *Brown* decision).

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sion.[356] Thus, blacks are more likely to be associates than partners, work in low visibility/low prestige areas of practice, and labor under the deadly combination of diminished expectations and increased scrutiny. None of this means that black lawyers are *incapable* of fulfilling the terms of the obligation thesis. Nevertheless, given their vulnerability, it is likely that many black attorneys will frequently have to watch silently, or perhaps even actively participate in conduct that undermines the cause of racial justice. Black lawyers need to develop ways of recognizing and repaying these unfulfilled moral claims.

In constructing such a strategy, today's black attorneys can learn a great deal by studying the actions of the most articulate and thoughtful defender of the obligation thesis: Charles Hamilton Houston. As I have indicated, in the 1930s, Houston set about creating an elite core of black lawyers who would be specially trained to wage a concerted campaign against legal segregation.[357] The accomplishments of these black "social engineers," including *Brown v. Board of Education* and the modern civil rights movement, are well documented.[358] What is less well known is how Houston and his protégé Thurgood Marshall dealt with the inevitable tension between their litigation strategy and other legitimate—and perhaps even more pressing—concerns within the black community.

Although we now take for granted the wisdom of Houston's legal campaign to overturn *Plessy v. Ferguson*, at the time many features of Houston's strategy were deeply controversial. One especially pointed criticism leveled by some of Houston's contemporaries was that a legal assault on America's apartheid—particularly one aimed first at graduate schools—failed to address more pressing concerns in the black community.[359] Houston and Marshall refused to change their legal strategy to suit these critics. At the same time, they devoted substantial energy outside of the context of their legal attack on *Plessy* to issues of concern in the black community that went beyond the need to

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356. *See id.* at 583-87.

357. *See* MCNEIL, *supra* note 2, at 3 ("'When Brown against the Board of Education was being argued . . . [t]here were some two dozen lawyers on the side of the Negroes . . . only two hadn't been touched by Charlie Houston . . . .'" (quoting *College Honors Charles Houston '15*, AMHERST MAG., Spring 1978, at 12, 14) (first alteration in original)).

358. *See generally* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994) (accounting in detail the strategies and actions of Thurgood Marshall, Charles Houston, and other civil rights attorneys).

359. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality 150 (1976) (documenting that a diverse array of critiques, ranging from Ralph Bunche to Booker T. Washington, raised one or another form of this objection to Houston's strategy).

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desegregate public education.[360] In so doing, both men recognized the legitimate moral pull of those claims by the African American community that could not be incorporated into their litigation strategy.

Today's black lawyers can pursue a similar strategy. For example, Anthony Griffin repeatedly emphasized that despite the fact that he was the Klan's lawyer, he considered the Klan to be a terrorist organization that should be condemned at every turn.[361] These statements acknowledge black communities' legitimate fear of Klan violence—a concern that Griffin's strong personal commitment to civil liberties left him unable to express in his decision to represent the Klan. Similarly, lawyers in Darden's position who believe that they are constrained by existing professional norms to present arguments they believe to be detrimental to the black community can lobby to repeal or modify these ethical rules. Pro bono work on behalf of poor black clients is another way in which black lawyers can acknowledge and support those interests of the black community that they are unable to protect in the regular course of their work as lawyers.

None of these forms of alternative service can take the place of a sincere commitment to balance the competing demands of the three moral spheres during the course of client representation. Nevertheless, living a moral life in the law involves keeping track of the moral debts and credits generated from one's distinct moral commitments so as to ensure that one is doing one's "fair share" to advance the causes of professionalism, racial justice, and autonomy.[362]

IV. CONCLUSION: WHERE DO WE GO FROM HERE?

Let us return to the challenge with which we began. Is it possible to define a role for race-based moral obligations that neither undermines the legitimate rights of consumers nor unduly constrains the opportunities of black lawyers? I submit that we can now answer this question with a qualified "yes."

The analysis I propose offers consumers four interlocking safeguards that their legitimate interests will be protected. First, the model insists that professional obligations carry independent moral

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360. *See id.* at 159 (noting that Houston and Marshall constantly spoke out on such issues as voting rights, the rights of criminal defendants, and anti-lynching legislation).

361. *See* Teresa Talfrico, *Texas Grand Dragon a Study in Paradox for the Klan Today*, SAN ANTONIO EXPRESS-NEWS, Sept. 4, 1994, *available in* 1994 WL 3535441 (quoting Griffin as stating "the Klan is the Klan . . . . The Klan are terrorists as far as I'm concerned").

362. *See* Gutmann, *supra* note 70, at 171-74 (defending "color-conscious" moral obligations on the basis of the "color-blind" principle of fair play).

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weight. Black lawyers, like all lawyers, must take these obligations seriously. Second, all legitimate racial obligations must be derived from, and ultimately be subservient to, common morality. Racial obligations are therefore no excuse for race-based oppression. Third, in cases where there is an unavoidable conflict between a black lawyer's racial obligations and her professional commitments, it is the legitimate social purposes underlying her professional obligations that must eventually carry the day. Racial solidarity, in other words, can never undermine the legitimate (as opposed to the self-interested) demands of professionalism. Fourth, to the extent that a black lawyer finds it impossible to conform to these demands, she must, like Robert Johnson, express her disagreement in ways that ultimately support the moral force of the professional norm.

These safeguards should, in turn, help to protect black lawyers from the claim that they are not "real" lawyers because they have commitments based on contingent features of their identity. As a preliminary matter, these commitments will often reinforce, rather than undermine, a black lawyer's willingness to uphold the legal profession's articulated standards. But even in circumstances where professional and group-based concerns conflict, it is far from clear that the profession or those it serves would be better off if these conflicts were always resolved in favor of existing norms or practices. By branding all outside ideas as illegitimate, bleached out professionalism tends to discourage innovation in the delivery of legal services.

Many of the most powerful critiques of current professional norms have been launched in the name of particular identities. Consider, for example, the alternative dispute resolution movement. Many of the leading advocates of this movement are women who believe, for one reason or another, that the prevailing bleached out standards of adversarialness reflect a distinctly "male" ethos hostile to women.[363] This critique has had a profound impact on lawyers—both men and women—and on clients. To be sure, many of the tenets of the alternative dispute resolution movement remain controversial, not the least of which is the connection between the critique of the adversary system and claims about the reasoning styles of women and men. Indeed, the claim that women may be particularly inclined toward more consensual styles of dispute resolution has undoubtedly made it more difficult for some women to pursue careers in traditional fields

363. *See, e.g.*, Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 28-31 (1996) (exploring the cultural biases of the adversary system); Menkel-Meadow, *supra* note 62 (linking critiques of the adversary system with feminist critiques of "male" styles of conflict resolution).

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such as litigation. Nevertheless, few would deny that both clients and the profession as a whole have benefited from this shift in adversary culture—a shift that owes much of its life to the feminist critique of bleached out professionalism.

One can tell a similar story about the critique mounted by blacks and other minorities of traditional hiring, evaluation, and promotion policies in large law firms. For a number of years, black lawyers, often acting pursuant to the obligation thesis, have been challenging the extent to which law firms rely almost exclusively on a small number of credentials such as grades or law review membership in selecting new lawyers.[364] One basis for this challenge is that these credentials are only loosely correlated with future success as a lawyer. At the same time, firms pay relatively little attention to alternative credentials—for example, a demonstrated ability to thrive in a non-supportive environment, or the ability to work well with a diverse range of people—which are also valuable in law practice and which are more likely to be possessed by black applicants. Similarly, black lawyers argue that subjective evaluation procedures such as the ones typically used by large firms disadvantage black applicants. In recent years, firms have responded to these challenges by changing their hiring and promotion practices by, for example, training interviewers and instituting more formalized evaluation and assignment systems.[365] Not surprisingly, these policies benefit all associates and, to the extent that these practices produce better lawyers, all clients as well.

Indeed, there is substantial evidence that, contrary to the assumptions underlying bleached out professionalism, race consciousness, not colorblindness, is the most effective strategy for negotiating diversity in the workplace. In a series of pioneering studies, David Thomas determined that interracial teams that openly discuss issues of race are more likely to form long-term supportive and productive working relationships.[366] Suppression of difference, therefore, is not the best way to deal with difference. To the extent that black lawyers help to open up a dialogue about the role of race and other forms of contingent identity on professional practice, they will have performed an important service for their own workplaces and for the profession as a whole.

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364. I examine this controversy in some detail in Wilkins & Gulati, *supra* note 20.

365. *Id.* at 590-92.

366. *See* David A. Thomas, *Racial Dynamics in Cross-Race Developmental Relationships*, 38 ADMIN. SCI. Q. 169 (1993); David A. Thomas, *The Impact of Race on Managers' Experiences of Developmental Relationships (Mentoring and Sponsorship): An Intra-Organizational Study*, 11 J. ORGANIZATIONAL BEHAV. 479 (1990).

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Of course, the fact that black lawyers committed to the obligation thesis may confer certain benefits on clients and the profession will not prevent them from being stigmatized as less than "real" lawyers. This danger, of course, must be put in the context of the kind of demonizing of black lawyers that currently goes on under the banner of bleached out professionalism. It is possible, perhaps even likely, that any move by black lawyers to embrace the obligation thesis more fully will only serve to exacerbate these affronts.

The real question, therefore, is not whether the obligation thesis can ever completely escape the opportunity critique; it cannot. Instead, the question that must be asked is whether the benefits of black lawyers' embracing this moral commitment outweigh its costs. These costs and benefits cannot be measured solely, or even primarily, from the perspective of those black women and men who are fortunate enough to become lawyers. Black lawyers have *already* benefited from the obligation thesis. Without the dedicated actions of Charles Hamilton Houston and Thurgood Marshall, the current generation of black lawyers would have few of the advantages that they currently enjoy. Instead, calculations concerning the benefits of the obligation thesis, like any other moral obligation, must be evaluated primarily from the perspective of those the thesis is intended to benefit: the black women and men who continue to suffer in poverty and degradation in the midst of this land of plenty. This community desperately needs the support and commitment of those of us who have managed to stake out a tenuous, but nevertheless important, toehold on the American dream. Providing that help inevitably involves risks, but those risks (at least as I have defined them) pale in comparison with the chance to finally make progress on ending America's legacy of racial oppression.

Of course, even if black lawyers were to accept everything that I have said here, important questions remain. To mention just one: What sanctions are appropriate for those black lawyers who fail to live up to the legitimate demands of one or the other of the three moral spheres? For example, was Pataki justified in taking the decision whether to impose the death penalty out of Johnson's hands? Does it matter that Pataki acted before the expiration of the statute's 120-day discretionary review period? Was Pataki justified in replacing Johnson, a death penalty abolitionist, with a white death penalty hawk? Or, consider if the circumstances had been reversed. Should Pataki or any other legal employer be entitled to discipline a black lawyer for *not* considering the interests of the African American community?

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These and other similar questions demonstrate the difficulty of dispensing with the simplifying assumptions of bleached out professionalism. But simplicity, as I have tried to show here, also has its price. Bleached out professionalism, representing race theory, and personal morality lawyering all ignore important dimensions of the intersection between race and the professional role. Moreover, it is possible to move beyond these accounts without ignoring legitimate consumer interests or unduly closing the opportunities open to black attorneys. To be sure, many difficult choices remain. Confronting this complexity, however, is the unavoidable price black Americans must pay if we are to salvage both our identities and our roles.

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